88-1685

No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1988

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CURTIN MATHESON SCIENTIFIC, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether, in assessing the reasonableness of an employer's asserted doubt that an incumbent union enjoys continued majority support, the Board may refuse to apply any presumption regarding the extent of union support among replacements for striking employees.

PARTIES TO THE PROCEEDINGS

In addition to the parties identified in the caption, the following union also appeared in the proceedings before the Board: General Drivers, Warehousemen and Helpers, Local 968, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CURTIN MATHESON SCIENTIFIC, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Acting Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-24a), is reported at 859 F.2d 362. The decision and order of the National Labor Relations Board (App., *infra*, 25a-54a) are reported at 287 N.L.R.B. No. 35.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 55a) was entered on November 4, 1988, and a petition for rehearing was denied on December 22, 1988 (App., *infra*, 56a-57a). On March 8, 1989, Justice White extended the time within which to file a petition for a writ of certiorari to and including April 21, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(a)(1) and (5) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(1) and (5), provides:

> It shall be an unfair labor practice for an employer –
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 159(a) of this title.

Section 7 of the NLRA, 29 U.S.C. 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

STATEMENT

At the conclusion of an economic strike, the respondent employer, claiming a reasonable doubt that the incumbent union retained majority support among the bargaining unit employees, withdrew recognition from that union. The National Labor Relations Board (NLRB or Board) disagreed and issued a bargaining order. In assessing the reasonableness of respondent's position, the Board held that it would apply no presumption concerning the extent

to which the striker replacements hired by respondent supported the union. A divided court of appeals denied enforcement of the Board's order. In place of the Board's "no-presumption" rule, the court applied a presumption that striker replacements oppose the existing union. The Board seeks review of that decision, which presents an important and recurring question on which the circuits are divided.

1. Respondent is a Texas corporation that trades in laboratory instruments and supplies and maintains a warehouse in Houston. On April 15, 1970, the Board certified Local 968, General Drivers, Warehousemen and Helpers (the Union) as the collective bargaining agent for respondent's production and maintenance employees. On May 21, 1979,[1] the latest collective-bargaining agreement between the parties expired, and on May 25 the company made its final offer. The Union rejected that offer on May 29. A lockout of all 27 bargaining unit employees lasted from June 4 to June 12, when respondent renewed its offer of May 25. The Union again rejected it. App., *infra*, 2a-3a.

On June 13, the Union began an economic strike. Five of the 27 bargaining unit employees immediately crossed the picket line and returned to work. On June 17, respondent put into effect the wage schedule proposed in its May 25 offer. On June 25, with the strike still in progress, respondent hired 29 new employees to replace the 22 strikers; respondent contended that the additional seven employees were hired to compensate for the new workers' inexperience and to allow for attrition. App., *infra*, 3a.

On July 16, the Union ended its strike, offering unconditionally to accept the May 25 offer. On July 19, the Union asked respondent to execute a contract embodying

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[1] All dates given are in 1979 unless otherwise noted.

the May 25 terms. The following day, July 20, respondent notified the Union that the May 25 offer was unavailable. It also stated that because it entertained doubts about the Union's continued majority status, it was withdrawing recognition and refusing to bargain further. As of that date, the bargaining unit consisted of 19 employees who had participated in the strike and who had not been reinstated, 25 replacements, and five "crossover" employees who had crossed the picket line and were then working for the company. App., *infra*, 3a.

Also on July 20, the Union asked the respondent to furnish information regarding the total number of bargaining unit employees on the payroll, and the job classification and seniority of each of those employees. Respondent refused. App., *infra*, 3a-4a.

2. On July 30, the Union filed unfair labor practice charges with the Board, alleging violations of Section 8(a)(1) and (5) of the NLRA, 29 U.S.C. 158(a)(1) and (5), and on September 7, a complaint was issued. App., *infra*, 4a. The complaint was dismissed by the Administrative Law Judge, but was reinstated by the Board, which found that respondent lacked a reasonable doubt concerning the Union's majority status. *Id.* at 25a-54a. The Board explained that " '[a]bsent unusual circumstances, there is an irrebuttable presumption that a union enjoys majority status during the first year following its certification' " (*id.* at 32a (citation omitted)). Thereafter, the Board continued, "the presumption of majority status continues but may be rebutted" by the employer in one of two ways: "(1) by showing that on the date recognition was withdrawn the union did not in fact enjoy majority status, or (2) by presenting evidence of a sufficient objective basis for a reasonable doubt of the union's majority status at the time the employer refused to bargain" (*ibid.*). In the present case, the Board noted (*ibid.*), respondent sought to

establish the second line of defense. Rejecting that defense, the Board found that "the fact that 5 of the 27 unit employees crossed the picket line does not in itself support an inference that the 5 repudiated the Union as the collective-bargaining representative" (*ibid.*). It also explained (*id.* at 33a) that certain statements of particular employees did not clearly evidence disapproval of the Union.

Finally, relying on its decision in *Buckley Broadcasting Corp. of California d/b/a Station KKHI & National Association of Broadcast Employees & Technicians, Local 51,* (*Station KKHI*), 284 N.L.R.B. No. 113 (July 27, 1987), application for enforcement pending, No. 88-7106 (9th Cir. filed Mar. 7, 1988), the Board explained (App., *infra*, 33a) that it would not "use any presumptions with respect to the[] union sentiments" of the 25 striker replacements. The Board stated that it would "instead * * * take a case-by-case approach," requiring "additional evidence of a lack of union support on the replacements' part in evaluating the significance of this factor in the employer's showing of good-faith doubt" (*ibid.*). Applying that standard, the Board concluded that "[t]aking into account all the factors relied on by the Respondent to support its asserted reasonable doubt of the Union's majority status, * * * the evidence is insufficient to rebut the presumption of the Union's continuing majority status" (*id.* at 35a). It therefore held that respondent had violated Section 8(a)(1) and (5) by withdrawing recognition from the Union; by refusing to furnish the information that the Union had requested; and by refusing to execute the collective-bargaining agreement proposed by the Union on July 19 and embodying the terms previously offered by respondent on May 25 (*id.* at 35a-38a). The Board ordered the company to cease and desist; on request, to bargain with the Union and to execute an agreement based on the

May 25 terms; to furnish the requested information; and to post an appropriate notice (*id.* at 39a-42a).

3. The court of appeals denied enforcement by a divided vote, concluding that respondent had established a reasonable doubt of the Union's majority status (App., *infra*, 1a-24a). The court first noted (*id.* at 6a-8a) that several employees who crossed the picket line, and others who remained on the picket line, had expressed anti-union sentiments to respondent's director of employee relations. The court next rejected the Board's decision to apply no presumption regarding the preferences of the replacements. Citing prior Fifth Circuit case law, the court instead approved (*id.* at 9a & n.1) the so-called "Gorman presumption"—drawn from Professor Gorman's labor law text—according to which " 'it is generally assumed that [a replacement] does not support the Union and that he ought not to be counted toward a Union majority' " (*id.* at 9a n.1, quoting R. Gorman, *Labor Law* 112 (1976)). The court found that the Gorman presumption was warranted in this case because "a substantial percentage of the bargaining unit employees [was] replaced on the same day, and the striker replacements cross[ed] a picket line" (App., *infra,* 10a). The court also noted (*ibid.*) that both the First and Eighth Circuits had approved the Gorman presumption. Applying that presumption, the court held that "the Company is justified in counting the striker replacements as employees whom they doubt support the Union" (*ibid.*).

Judge Williams dissented (App., *infra*, 11a-24a). "The outcome of this case," he explained (*id.* at 12a), "turns on the significance attached to the hiring of permanent replacement workers during an economic strike." In his view, the Board had offered "compelling" reasons for adopting a rule according to which it would "refuse[] to presume that the replacement workers are for or against the union" (*id.* at 13a, 15a). Judge Williams noted that

the Board's approach permits it "to take into account the particular circumstances surrounding each strike and the hiring of replacements, while retaining the long-standing requirement that the employer must come forth with some objective evidence to substantiate his doubt of continuing majority status" (*id.* at 15a). Observing that "there is a conflict among the circuits" regarding which, if any, presumption should be applied (*id.* at 17a-18a), Judge Williams concluded that "[t]he refusal to attach any presumptive weight to the hiring of replacement workers is, at the very least, a reasonable policy choice which is not inconsistent with the National Labor Relations Act" (*id.* at 16a). Accordingly, he stated, "even if this Court prefers a different approach the only proper course is to enforce the Board's view because of the deference we are required to afford the Board's policy decisions" (*ibid.*). Applying the Board's no-presumption rule for replacements, Judge Williams would have enforced the Board's order requiring respondent to recognize and bargain with the Union (*id.* at 20a-24a).

REASONS FOR GRANTING THE PETITION

The question presented in this case is whether, in establishing a reasonable doubt of a union's majority status, an employer enjoys a presumption that permanent replacements for striking workers do not support the union. Relying on its prior decision in *Station KKHI,* the Board held in the present case that no such presumption should be applied. The no-presumption rule is plainly "rational and consistent" with the National Labor Relations Act and was therefore "entitled to deference from the courts." *Fall River Dyeing & Finishing Corp.* v. *NLRB,* 482 U.S. 27, 42 (1987). Nevertheless, the court of appeals rejected the Board's rule in favor of the so-called Gorman presump-

tion, according to which striker replacements are presumed to oppose the incumbent union. The court's decision misconstrues the no-presumption rule; it substitutes a contrary rule that lacks empirical or policy support; and it impermissibly second-guesses the Board's accumulated expertise in administering the statute. Moreover, as three Members of this Court noted in *Pennco, Inc.* v. *NLRB,* 459 U.S. 994 (1982) (White, J., dissenting from denial of certiorari), the circuits are divided on the question whether, and to what extent, presumptions are appropriate in assessing the union sentiments of striker replacements. Further review of the court of appeals' decision is therefore warranted.

1. a. "[A]fter a union has been certified by the Board as a bargaining-unit representative, it usually is entitled to a conclusive presumption of majority status for one year following the certification." *Fall River Dyeing,* 482 U.S. at 37. Accord *NLRB* v. *Burns International Security Services, Inc.,* 406 U.S. 272, 279 n.3 (1972); *Brooks* v. *NLRB,* 348 U.S. 96, 98-99 (1954). See also 29 U.S.C. 159(c)(3). "[A]fter this period, the union is entitled to a rebuttable presumption of majority support." *Fall River Dyeing,* 482 U.S. at 38; *Burns International,* 406 U.S. at 279 n.3. To rebut that presumption, an employer may show either (1) that the union did not in fact enjoy majority status, or (2) that there was a sufficient, objective basis for a reasonable doubt of the union's majority status.[2]

b. In the present case, respondent asserted a doubt that the Union retained majority support and on that basis

[2] See, *e.g., Whisper Soft Mills, Inc.* v. *NLRB,* 754 F.2d 1381, 1387 (9th Cir. 1984); *NLRB* v. *Pennco, Inc.,* 684 F.2d 340, 342 (6th Cir.), cert. denied, 459 U.S. 994 (1982); *NLRB* v. *Windham Community Memorial Hosp.,* 577 F.2d 805, 811 (2d Cir. 1978); *Retired Persons Pharmacy* v. *NLRB,* 519 F.2d 486, 489 (2d Cir. 1975). Cf. *Fall River Dyeing,* 482 U.S. at 41 n.8.

withdrew recognition. The question presented is whether, in evaluating the reasonableness of an employer's position, the Board must presume that striker replacements oppose the union.

In its 1987 decision in *Station KKHI,* the Board revised its approach to that question (App., *infra,* 58a-91a). The Board noted that in prior cases it had approved the "presumption * * * that permanent strike replacements hired during a strike support the union in the same ratio as the striking employees whom they replaced" (*id.* at 62a). The Board held, however, that "[a]s a matter of policy, there is no warrant for [that] presumption" (*id.* at 63a). Moreover, the Board stated, the presumption adopted in its prior cases had been "uniformly rejected" by the courts of appeals (*id.* at 72a) and lacked any "evidentiary or empirical basis" (*id.* at 74a). The Board therefore "carefully reviewed [its] past decisions and assessed [its] experience to determine if they suggest generalizations about the views of permanent strike replacements that are so universal that they support one overall presumption that can be applied when evaluating a union's majority status" (*ibid.*). The Board concluded that no such "universal" generalizations could be drawn. It therefore found "no basis for presuming that strike replacements who have accepted employment and are therefore willing to cross a picket line in order to go to work favor union representation" (*id.* at 75a).

Correspondingly, the Board found "the contrary presumption"—that "permanent replacements who cross a picket line * * * repudiate the union"—"equally unsupportable" (App., *infra,* 75a). It noted that a strike replacement "may be forced to work for financial reasons, or may disapprove of the strike in question but still desire union representation and would support other union initiatives" (*ibid.*). Apart from the fact that the contrary presumption

is "not factually compelling" (*ibid.*), the Board also observed that "adoption of this presumption would disrupt the balance of competing economic weapons long established in strike situations and substantially impair the employees' right to strike by adding to the risk of replacement the risk of loss of the bargaining representative as soon as replacements equal in number to the strikers are willing to cross the picket line" (*id.* at 75a-76a).

In short, the Board in *Station KKHI* "discern[ed] no overriding generalization about the views held by strike replacements and therefore * * * decline[d] to maintain or create any presumptions regarding their union sentiments" (App., *infra,* 76a). Instead, the Board held that it would henceforth "review the facts of each case" and "require 'some further evidence of union non-support' before concluding that an employer's claim of good-faith doubt of the union's majority is sufficient to rebut the overall presumption of continuing majority status" (*ibid.* (footnote omitted)).

c. The no-presumption rule adopted in *Station KKHI* and applied by the Board in the present case plainly is "rational and consistent with the Act" and was therefore "entitled to deference" from the court of appeals. *Fall River Dyeing,* 482 U.S. at 42. See also *Charles D. Bonanno Linen Service* v. *NLRB,* 454 U.S. 404, 413 (1982); *Ford Motor Co.* v. *NLRB,* 441 U.S. 488, 495, 497 (1979); *Beth Israel Hospital* v. *NLRB,* 437 U.S. 483, 500-501 (1978).[3] The court below rejected the Board's rule, however, in

[3] Deference is owed to decisions of the Board even where the Board's position represents a change from prior policy. *NLRB* v. *Local 103, Ironworkers,* 434 U.S. 335, 351 (1978). As the Court explained in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975), "[t]he responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board" (*id.* at 266).

favor of the Gorman presumption.[4] The court of appeals' decision is clearly mistaken, in at least three respects.

First, the court seems to have misunderstood the way in which the no-presumption rule operates. The court surmised that the no-presumption rule "has the same effect as the presumption that striker replacements support the union in the same ratio as the employees they replace" (App., *infra,* 9a). As Judge Williams explained in dissent (*id.* at 17a), however, the two standards operate quite differently. To be sure, under the no-presumption rule the employer must still overcome the general rebuttable presumption that the union enjoys majority support. But unlike the Board's prior standard, the no-presumption rule does not require the employer to overcome the additional "presumption that the replacement workers * * * support the union" (*ibid.*). The court of appeals' failure to recognize the practical differences between the Board's present and prior standards apparently contributed to the court's unwillingness to accept the no-presumption rule in this case.

Second, the court of appeals offered no empirical support for the Gorman presumption, nor did it provide a reason for rejecting the Board's finding that the Gorman presumption is not "factually compelling" (App., *infra,* 75a). As the Board noted in its *Station KKHI* decision, a striker replacement "may be forced to work for financial reasons, or may disapprove of the strike in question but still desire union representation and would support other union initiatives" (*ibid.*). "[M]any workers might well be

[4] The term is a misleading one, since it does not appear that Professor Gorman was advocating such a presumption, only that he was reporting the Board's approach as he then understood it. See R. Gorman, *Labor Law* 112 (1976). In fact, the Board had modified that approach shortly before the publication of Gorman's text. See *Cutten Supermarket*, 220 N.L.R.B. 507 (1975).

pro-Union but might need the job or might reject the use of strikes in" a particular industry. *NLRB* v. *Windham Community Memorial Hosp.*, 577 F.2d 805, 813 (2d Cir. 1978). See also *Allied Indus. Workers Local 289* v. *NLRB*, 476 F.2d 868, 881 (D.C. Cir. 1973).

Finally, the court's decision inappropriately second-guesses the well-reasoned policy determination of "the agency charged with enforcing the National Labor Relations Act" (*Pennco, Inc.* v. *NLRB*, 459 U.S. 994, 996 (1982) (White, J., dissenting from denial of certiorari)). As the Board explained in *Station KKHI*, "adoption of [the Gorman] presumption would disrupt the balance of competing economic weapons long established in strike situations and substantially impair the employees' right to strike by adding to the risk of replacement the risk of loss of the bargaining representative as soon as replacements equal in number to the strikers are willing to cross the picket line" (App., *infra*, 75a-76a). By contrast, the Board's rule—which requires the employer to establish the preferences of the striker replacements, without the assistance of a presumption—denies the employer the power to oust an incumbent union simply by replacing a sufficient number of its members. The no-presumption rule thus furthers "[t]he overriding policy of the NLRA" of preserving " 'industrial peace' " by " 'promot[ing] stability in collective-bargaining relationships" (*Fall River Dyeing*, 482 U.S. at 38). It also protects the right to strike, a right accorded special recognition in the Act. See 29 U.S.C. 163. Even if the court below favored a different policy, it had no basis for rejecting "the balance struck by the Board" (*NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975)).

2. a. The question presented in this case has divided the courts of appeals. Like the court below, the First Circuit, in *Soule Glass & Glazing Co.* v. *NLRB*, 652 F.2d 1055 (1981), approved the Gorman presumption. In *Soule*

Glass, the employer withdrew recognition from the union, contending that the number of striker replacements exceeded the number of employees who were still on strike. The court of appeals, refusing to enforce the Board's order, upheld the employer's decision. Quoting the Gorman presumption, the court explained (*id.* at 1110 (citation omitted)) that "[s]triker replacements are 'generally assumed * * * not [to] support the union and * * * ought not to be counted toward a union majority.' " The court applied the presumption and therefore treated all of the striker replacements as opponents of the union.[5]

The Eighth Circuit took a similar approach in *National Car Rental System, Inc.* v. *NLRB*, 594 F.2d 1203 (1979). In that case, the Board had ruled against the employer, applying its then-existing rule that striker replacements are presumed to support the union in the same ratio as the employees they replaced. The court of appeals denied enforcement, holding that the employer had established a sufficient basis for withdrawing recognition from the union. In doing so, the court articulated, and apparently relied upon, the Gorman presumption (*id.* at 1206).[6]

By contrast, two courts of appeals have rejected the rationale underlying the Gorman presumption. In *NLRB* v. *Windham Community Memorial Hosp.*, 577 F.2d 805 (1978), the Second Circuit held that the employer had not rebutted the presumption of continued majority status. The court assumed, without deciding, that the Board's

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[5] In addition to applying the presumption, the court stated that "the great majority of the replacements testified that they in fact wanted nothing to do with [the union] and preferred a nonunion shop" (652 F.2d at 1111).

[6] See also *Whisper Soft Mills, Inc* v. *NLRB*, 754 F.2d 1381, 1388 n.10 (9th Cir. 1984) (citing, with apparent approval, the proposition that it is "generally fair to assume that strike replacements do not support the union and should not be counted toward union majority").

then-prevailing presumption—that replacements support the union in the same ratio as the employees they have replaced—"was incorrect" (*id.* at 813). Nevertheless, the court stated, the employer's contrary presumption—"that no replacement employee supports the Union"—"is equally, if not more, assailable than the NLRB's; many workers might well be pro-Union but might need the job or might reject the use of strikes in [the particular industry]" (*ibid.*). Explaining that "presumptions do not provide [the objective] evidence" necessary to sustain an employer's burden of proof (*ibid.*), the court of appeals enforced the Board's order requiring the employer to bargain with the union.

Similarly, in *NLRB* v. *Pennco, Inc.*, 684 F.2d 340, cert. denied, 459 U.S. 994 (1982), the Sixth Circuit refused to accept either the Board's "constant ratio" presumption or the employer's suggested presumption that no replacement supports the union "when violence occurs on the picket line" (684 F.2d at 342). The court of appeals found that neither presumption was "justified under this set of stipulated facts" (*ibid.*).

b. Three Members of this Court, dissenting from the denial of certiorari in the *Pennco* case, expressly noted the conflict among the circuits concerning the use of presumptions in this context. After reviewing the court of appeals' decisions, Justice White, joined by Justices Rehnquist and Blackmun, concluded that "[t]he questions of whether presumptions can properly be used to determine whether a union has the support of striker replacements, and whether replacements should be presumed to oppose the certified union or favor the certified union, have produced conflict among the Courts of Appeals and between the Courts of Appeals and the agency charged with enforcing the National Labor Relations Act" (459 U.S. at 996). Because "[t]he questions are of obvious importance" and because of "[t]he need for a uniform approach to these

questions" (*ibid.*), these Justices would have granted the petition in the *Pennco* case.[7]

c. The decision below sharpens the conflict among the circuits still further. Rejecting the well-reasoned rule adopted by the Board, the court of appeals endorsed a presumption that lacks a solid empirical foundation and is significantly at odds with the purposes and policies of the NLRA. The decision below is also an appropriate vehicle for resolving the circuit conflict, since, as Judge Williams observed in dissent (Pet. App. 12a), "[t]he outcome of this case turns on the significance attached to the hiring of permanent replacement workers during an economic strike." Further review by this Court is therefore warranted.

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[7] The Board filed a brief in opposition in *Pennco*, a copy of which has been furnished to respondent. Without disputing the conflict among the circuits, the Board simply distinguished the cases that had relied on the Gorman presumption. In particular, the Board noted (Br. in Opp. 6-7) that unlike in *National Car Rental System, supra,* and *Soule Glass, supra,* the striker replacements in the *Pennco* case did not constitute a majority of the bargaining unit. Thus, the Board noted, "[e]ven if the presumption of majority status is rebutted where striker replacements constitute a majority of the bargaining unit, it does not follow that the same conclusion is warranted where, as here, the replacements constituted only a minority of the unit employees" (Br. in Opp. 6-7). In the present case, by contrast, the replacements constituted a majority of the bargaining unit on the date that respondent withdrew recognition from the union. The application of the Gorman presumption was thus crucial to the result reached by the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1989

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 88-4012

CURTIN MATHESON SCIENTIFIC, INC.,
PETITIONER CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT CROSS-PETITIONER

Nov. 4, 1988

Before WILLIAMS and GARWOOD, Circuit Judges, and NOWLIN,* District Judge.

NOWLIN, District Judge:

This case is before the Court on the petition of Curtin Matheson Scientific, Inc., for review of the unfavorable decision of the National Labor Relations Board (the Board), and the Board's cross-application for enforcement. The Board found that Curtin Matheson Scientific, Inc. (the Company) violated sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (5), by withdrawing recognition of Local 968, General Drivers, Warehousemen and Helpers (the Union) as the representative of the Company's employees, by failing and

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* District Judge of the Western District of Texas, sitting by designation.

refusing to furnish the Union with certain information requested, and by failing and refusing to execute a written contract embodying a collective-bargaining agreement found to have been reached on July 16, 1979.

The Board ordered the Company to desist from these unfair labor practices. As affirmative relief, the Board ordered the Company to recognize and, on request, to bargain with the Union concerning the terms and conditions of the employment of the bargaining unit employees, and to provide the information requested. The Board further ordered the Company to execute the collective-bargaining agreement if the Union so requested, and to give retroactive effect to the agreement's terms and conditions and make the bargaining unit employees whole for any losses they suffered as a result of the Company's refusal to sign the agreement. If the Union elected not to request execution of the agreement, then the Board ordered the Company to bargain in good faith with the Union concerning the terms and conditions of a new agreement, and to sign a contract embodying any agreement reached. Finally, the Company was required to post copies of a remedial notice to employees. We reverse.

I.

The Company trades in laboratory instruments and supplies, and maintains a warehouse in Houston, Texas, where the acts which are the basis of this case occurred. On April 15, 1970, the Board certified Local 968, General Drivers, Warehousemen and Helpers, which was affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the Union), as the collective-bargaining agent for the company's production and maintenance employees. On May 21, 1979, the latest collective-bargaining agreement

between the parties expired. The Company and the Union had not reached contract agreement when, on May 25, 1979, the Company made a final offer. The Union rejected this offer on May 29, 1979. A lockout of all twenty-seven bargaining unit employees lasted from June 4 to June 12, 1979. On June 12, 1979, the Company's offer was renewed and again rejected.

On June 13, 1979, the Union began an economic strike which lasted until July 16, 1979. Five of the twenty-seven bargaining unit employees immediately crossed the picket line and returned to work. The record contains no evidence of picket line or other strike-related violence or threats during the course of the strike. On June 17, 1979, the Company put into effect the wage schedule proposed in its May 25, 1979 offer. On June 25, 1979, with the strike still in progress, the Company hired twenty-nine new employees to replace the twenty-two strikers; the additional seven employees were hired to compensate for the new workers' inexperience and to allow for attrition.

On July 16, 1979, the Union ended its strike, offered unconditionally to have the striking employees return to work, and informed the Company that it was accepting the May 25, 1979 offer. The Union asked the Company to execute the contract on July 19, 1979. Then, on July 20, 1979, the Company notified the Union that the May 25, 1979 offer was not available, and because it had doubts as to the Union's majority status, that the Company was withdrawing recognition and refusing to bargain further. On July 20, 1979, there were nineteen employees still on strike, and twenty-five striker replacements and the five cross-over employees working for the Company in bargaining unit positions.

On July 20, 1979, the Union also requested that the Company furnish information regarding the total number of bargaining unit employees on the payroll, and the job

classification and seniority of each of these employees. The Company did not furnish this information.

The Union filed an unfair labor practices charge with the Board on July 30, 1979, alleging violations of sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (5). The Board issued a complaint against the Company on September 7, 1979. Administrative Law Judge Martin S. Bennett (the ALJ) heard the matter on June 10, 1980. In his November 20, 1980 decision, the ALJ held that the Company had a reasonably based good-faith doubt as to the Union's majority status, and dismissed the entire complaint on that ground.

The Board reviewed the ALJ's decision, and on December 16, 1987, held that the Company had not made an adequate showing of good faith doubt. *See Curtin Matheson Scientific, Inc.*, 287 NLRB No. 35 (1987). The Board concluded that the Company had violated sections 158(a)(1) and (5) of the Act by withdrawing Union recognition, by failing and refusing to furnish requested information, and by failing and refusing to execute the May 25, 1979 contract offer accepted by the Union on July 16, 1979. The Company timely appealed, invoking this Court's appellate jurisdiction under 29 U.S.C. §§ 160(e) and (f).

II.

We have previously established a framework for evaluating a company's withdrawal of recognition of a union. In *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720, 727-28 (5th Cir.1978), we provided:

> In the absence of special circumstances, a Union's majority status is irrebuttably presumed for a period of one year following certification or voluntary recognition. *See Brooks v. NLRB,* 1954, 348 U.S. 96,

103-04, 75 S.Ct. 176 [181-82], 99 L.Ed. 125 (certification); *NLRB v. Physicians & Surgeons Community Hospital,* 5 Cir., 1978, 577 F.2d 305, 307 (voluntary recognition). After the expiration of the certification year, the presumption of the Union's continuing majority support continues but becomes rebuttable. *J. Ray McDermott & Co. v. NLRB,* 5 Cir., 1978, 571 F.2d 850, 858; *NLRB v. Gulfmont Hotel,* 5 Cir.1966, 362 F.2d 588. A good faith doubt of the union's majority status is a defense to a refusal to bargain charge based on the withdrawal of recognition. That doubt must rest on 'objective evidence.' *J. Ray McDermott, supra,* and 'may not depend solely upon unfounded speculation or a subjective state of mind.' *Gulfmont Hotel, supra,* at 589. But the employer need not conclusively demonstrate that a majority of his employees no longer desire to be represented by the Union.

Accordingly, after the expiration of the collective-bargaining agreement on May 21, 1979, the Union enjoyed a rebuttable presumption that its majority status was continuing. The Company was justified in withdrawing recognition from the Union if it overcame the presumption of majority support by affirmatively establishing either: (1) at the time of withdrawal of recognition, the Union in fact no longer enjoyed majority status; or (2) the Company's refusal to bargain was predicated upon a reasonably grounded doubt as to the Union's continued majority status asserted in good faith, based upon objective considerations, and raised in a context free of employer unfair labor practices. It is the second ground upon which the Company relied in withdrawing recognition of the Union.

In reviewing the Board's findings and conclusions, we are limited by the substantial evidence rule, and should not review the charge *de novo. Universal Camera Corp. v.*

NLRB, 340 U.S. 474, 487-88, 71 S.Ct. 456, 464-65, 95 L.Ed. 456 (1951); *Randle-Eastern,* 584 F.2d at 725; 29 U.S.C. § 160(e). The Company asserts that its doubt was arrived at in good faith, based on the following factors: (1) the hiring of permanent replacements for all of the strikers and anti-union statements made by permanent replacements; (2) employees crossing the picket line; (3) strong anti-union statements and statements of non-support by cross-over employees and by striking employees; (4) expressions of Union officials concerning the weakness of the Union and lack of employee support, *e.g.,* "the employees didn't want anything to do with the Union;" and (5) Union inactivity and lack of communication with the Company. The ALJ's findings of fact were not overruled by the Board, and the facts as stated by the Board are uncontested by the parties.

On July 20, 1979, nineteen of the original twenty-two striking workers were still on strike, and twenty-five of the original twenty-nine striker replacements and the five cross-over employees were still working, for a total of forty-nine employees in the bargaining unit. *See C.H. Guenther & Son, Inc. v. NLRB,* 427 F.2d 983, 986-87 (5th Cir.), *cert. denied,* 400 U.S. 942, 91 S.Ct. 240, 27 L.Ed. 246 (1970); 29 U.S.C. § 152(3). Accordingly, before withdrawing recognition, the Company was required to have good faith doubt as to Union support by twenty-five of the employees. The Company's source of information regarding Union support was Elizabeth Price, the director of employee relations. In the two months prior to July 20, 1979, she had conversations with two of the cross-over employees, four of the strikers, and one striker replacement.

Ms. Price spoke with Tony Lopez and Bill Lee, two of the five cross-over employees. Both men were not Union members. Mr. Lopez talked twice with Price, indicating

that the Union had done nothing for the employees and that the Union's business representative was not doing his job. Mr. Lopez also stated that he had not and would not pay Union dues because he would not support the Union in any way. Mr. Lee stated that he did not pay Union dues because he did not support the Union and believed that the Union had not done anything for the employees.

The four strikers who crossed the picket line to speak with Ms. Price were Shady Goodson, J.R. Blackshire, Raymond Brunner, and Clint Waller. Chief Shop Steward Goodson, who was a member of the Union's negotiating committee, told Ms. Price that he was speaking on his own behalf; and although other striking employees shared his sentiments, he said he was not speaking as a representative of the Union employees or the Union. He felt that only the Union wanted the strike, not the employees. He was having difficulties manning the picket line. At a later time, Mr. Goodson requested reinstatement; and on July 19, 1979, he resigned. The Company would have been justified in giving significant weight to Mr. Goodson's comments, even though he was not speaking in his official capacity. *See Randle-Eastern,* 584 F.2d at 729; *Star Manufacturing Co. v. NLRB,* 536 F.2d 1192, 1196 (7th Cir. 1976); *Lodges 1746 and 743, International Association of Machinists v. NLRB,* 135 U.S.App.D.C. 53, 57-58, 416 F.2d 809, 812-13 (1969), *cert. denied,* 396 U.S. 1058, 90 S.Ct. 751, 24 L.Ed. 752 (1970).

Mr. Blackshire, a former shop steward, crossed the picket line to request reinstatement. He was angered by the Union first failing to pay him for walking the picket line, and then deducting Union dues from his payments. After requesting reinstatement, Mr. Blackshire spoke with friends working in the Company's warehouse. After a few minutes, he called Ms. Price over, and told her there was no Union anymore, that the people were not supporting it.

Mr. Blackshire also stated that there were other striking employees who wanted to return to work.

Mr. Brunner crossed the picket line to express his intention of retiring early because he did not want to work with the Union again. Finally, Mr. Waller indicated that he was not manning the picket line and would continue not to do so. He felt the Union was not representing the employees, and wanted "this thing," apparently the strike, to be over. He indicated a desire to withdraw from the Union.

Twenty-nine striker replacements were hired on June 25, 1979. There is no evidence of the Union attempting to contact any of the striker replacements during the strike. On July 19, 1979, Ms. Price spoke with one of the replacements, David Schneider. Mr. Schneider stated that he had experiences as a union and non-union worker. His assessment was that the Union did not represent the Company, and that the Union was not needed.

The Board relied on the standard set forth in *Buckley Broadcasting Corp. (Station KKHI),* 284 N.L.R.B. No. 113 (1987), in ruling that the Company did not have reasonably grounded good-faith doubt as to the Union's majority status. In *Station KKHI,* the Board rejected the presumption that striker replacements favor the union, and rejected the contrary assumption that strike replacements repudiate the union as their collective-bargaining representative. The Board concluded by declining to maintain or create any presumption regarding striker replacements' union sentiments. The Board contends that *Station KKHI* represents a comprehensive reconsideration of the Board's approach to the characterization of striker replacements in withdrawal of recognition cases. Prior to *Station KKHI,* the Board states that it presumed striker replacements desired to be represented by the incumbent union in the same ratio as the employees they replaced, a presumption that we discredited ten years ago in *Randle-Eastern.*

We do not agree that *Station KKHI* establishes a new standard because operationally the *Station KKHI* standard has the same effect as the presumption that striker replacements support the union in the same ratio as the employees they replace. Under the *Station KKHI* holding that no presumption will be made about striker replacements' support or nonsupport of the union, the general presumption of continuing union majority still applies. Under either standard, the Company is required to have objective evidence regarding the striker replacements' nonsupport in order to count them as employees whom the Company doubts support the Union.

In *Randle-Eastern,* we considered the presumption that new employees support the union in the same ratio as those they have replaced, and rejected its application where employee turnover results from the replacement of strikers. *Randle-Eastern,* 584 F.2d at 728. We also adopted the Gorman presumption,[1] stating that it was "especially true," where the striker replacements were the victims of picket line violence, and the Union was bargaining for the discharge of the striker replacements to make room for returning strikers. *Id.*

The Company contends that that the Gorman principle applies even in the absence of special circumstances such as those present in *Randle-Eastern.* Therefore, even though there was no picket line violence or negotiating to discharge the striker replacements, the Company argues that it was justified in counting the twenty-two striker replacements as not supporting the Union on July 20, 1979.

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[1] R. Gorman, Labor Law 112 (1976): "[I]f a new hire agrees to serve as a replacement for a striker (in union parlance, a strike breaker, or worse), it is generally assumed that he does not support the Union and that he ought not to be counted toward a Union majority."

We hold that the Company was justified in doubting that the striker replacements supported the Union in this context. Over eighty percent of the bargaining unit work force (twenty-two of twenty-seven employees) was replaced on June 25, 1979. Where such a substantial percentage of the bargaining unit employees is replaced on the same day, and the striker replacements cross a picket line, violent or not, to report to work each day, the Company is justified in counting the striker replacements as employees whom they doubt support the Union. This holding is in accord with the Eighth Circuit's opinion in *National Car Rental System, Inc. v. NLRB,* 594 F.2d 1203 (8th Cir.1979). The Eighth Circuit adopted the Gorman presumption where all ten of the original bargaining unit employees commenced a strike and were subsequently replaced by permanent employees who all began work within a one-week period and crossed picket lines to apply for and report to work. *See also Soule Glass & Glazing Co. v. NLRB,* 652 F.2d 1055, 1109-10 (1st Cir.1981).

We therefore reverse the Board's finding that the Company violated sections 8(a)(1) and (5) by withdrawing recognition of the Union. The Court also reverses the Board's findings that the Company violated these sections by refusing and failing to furnish the Union with certain information requested, and by failing and refusing to execute a written contract embodying a collective-bargaining agreement the Board found was reached on July 16, 1979. The information at issue was requested on July 20, 1979, the same day that the Company justifiedly withdrew recognition of the Union as the employees' collective-bargaining representative. Since an employer is only obligated to provide its employees' bargaining representative with information necessary and relevant to fulfill its statutory collective-bargaining function, the Company did not commit an unfair labor practice by refusing to provide the

information requested. By the same logic, no violation of sections 8(a)(1) and (5) occurred when the Company refused to execute a contract when the Union attempted to accept the Company's May 25, 1979 offer.

Enforcement denied.

JERRE S. WILLIAMS, Circuit Judge, dissenting:

I would enforce the Board's order requiring Curtin Matheson Scientific to recognize and, on request, bargain with the Union. I conclude that the Board's refusal to attach presumptive significance to the hiring of replacement workers is a reasonable policy choice which is not inconsistent with our prior decisions. Moreover, there is sufficient evidence to support the Board's determination that the Company's withdrawal of recognition in this case was not justified. Accordingly, I must respectfully dissent.

I. *Standard of Review*

As the majority correctly notes, but as I wish to emphasize, this Court does not review the Board's decision *de novo.* We do not reach our decision on the facts before us. Instead, we are limited by the substantial evidence rule, an inquiry as to whether the Board's decision is supported by "substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 487-88, 71 S.Ct. 456, 464-65, 95 L.Ed. 456 (1951). The simple phrase "substantial evidence", however, does not completely describe the standard of review in this particular case where we consider not only the Board's factual conclusions but also its evolving policy regarding the significance attached to the hiring of replacement workers.

A great degree of deference is owed to the Board's policy choices, even when "the Board might have struck a

different balance from the one it has, and it may be that some or all of us would prefer that it had done so." *Charles D. Bonanno Linen Service v. NLRB,* 454 U.S. 404, 413, 102 S.Ct. 720, 725, 70 L.Ed.2d 656 (1982). Indeed, when the Board's policy decision "is not an unreasonable or unprincipled construction of the statute [it] should be accepted and enforced." *Ford Motor Co. v. NLRB,* 441 U.S. 488, 497, 99 S.Ct. 1842, 1849, 60 L.Ed.2d 420 (1979). Moreover, we must remember that the Board is entitled to change its views, and the same deference must be shown to any new policy. *NLRB v. Local 103, Ironworkers,* 434 U.S. 335, 351, 98 S.Ct. 651, 660-61, 54 L.Ed.2d 586 (1978). In short, "the Board may alter its standards provided the new standards are rational and consistent with the Act." *Hotel Employees and Restaurant Employees Union, Local 11 v. NLRB,* 760 F.2d 1006, 1008 (9th Cir.1985).

II. *The Impact of Hiring Replacement Workers*

The outcome of this case turns on the significance attached to the hiring of permanent replacement workers during an economic strike.[1] We start with the statutory definition of employee which includes "any individual whose work has ceased as a consequence of or in connection with, any current labor dispute . . ." 29 U.S.C. § 152(3). Then the statute itself makes clear that employees who have been "replaced" are nevertheless still eligible

[1] As pointed out in later discussion, the other factors cited by the Company would not, by themselves, justify the withdrawal of union recognition. In particular, the refusal of five workers to join the strike and the statements of discontent by seven employees are not sufficient evidence to support a good faith doubt as to the Union's continued majority status, even where the workers purport to speak for other employees.

to vote in the bargaining unit. 29 U.S.C. § 159(c)(3) provides: "Employees engaged in an economic strike who are not entitled to reinstatement (because they have been replaced etc.) shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike." (parenthetical statement added). *See C.H. Guenther & Son, Inc. v. NLRB,* 427 F.2d 983 (5th Cir.), *cert. denied,* 400 U.S. 942, 91 S.Ct. 240, 27 L.Ed.2d 246 (1970) (enforcing a Board order based upon § 159(c)(3) as quoted above.)

These statutory provisions make effective the right to strike as a core principle in a free economic society. The guarantee is contained in 29 U.S.C. § 163. Then the statutory provisions go on to recognize the usual pragmatic resolution of an economic strike where replacements have been hired. The settlement of an active economic strike almost always requires reinstatement of the strikers with full seniority rights. The replacements often are retained also but at junior seniority. Attrition is counted upon gradually to reduce the work force to a realistic complement. Note that the statute sets twelve months as the realistic time of the outside limit upon whether a strike is active. In the case before us a mere month was the strike duration.

These facts and the statutory provisions lay the foundation for the consideration of the legal issue of importance in this case: Does the company have the right, under the law, to assume that the strike replacements are anti-union? The Board refuses to presume that the replacement workers are for or against the union, following its new policy set out in *Station KKHI (Buckley Broadcasting of California Corp., Inc.),* 284 N.L.R.B. No. 113, 125 L.R.R.M. (BNA) 1281 (1987), application for enforce-

ment pending, 9th Cir. No. 88-7106. Under this approach, a company which wishes to withdraw union recognition has the burden of providing objective evidence of a lack of union support, without the aid or detriment of any presumptions regarding replacement workers.

In *Station KKHI,* the Board reconsidered and rejected its prior position that replacement workers supported the incumbent union in the same ratio as the employees they replaced. Responding to criticism by the Courts of Appeals that this presumption was counterintuitive and created an unrealistic hurdle for employers to overcome, the Board concluded that "[a]s a matter of policy, there is no warrant for a presumption of strike replacement support for an incumbent union." 125 L.R.R.M. at 1283.

The Board in *Station KKHI,* however, also declined to adopt the opposite, negative presumption that replacement workers *do not* support the union. The Board recognized that the failure of replacement workers to withhold working as a means of supporting an economic strike is not necessarily an indication of dissatisfaction with the union. In particular, "an employee may be forced to work for financial reasons, or may disapprove of the strike in question but still desire union representation and would support other union initiatives." 125 L.R.R.M. at 1286. *See also NLRB v. Pennco, Inc.,* 684 F.2d 340, 342 (6th Cir.), *cert. denied,* 459 U.S. 994, 103 S.Ct. 355, 74 L.Ed.2d 392 (1982); *NLRB v. Windham Community Memorial Hospital,* 577 F.2d 805, 813 (2d Cir.1978).

The Board also identified significant policy concerns which led it to reject the negative presumption that replacement workers do not support the union. The ultimate impact of the negative presumption, and the unfortunate result of the majority opinion, is to allow an employer to withdraw union recognition in the economic strike context whenever he hires more replacement workers than the

number of employees on strike. The Board determined that this policy "would disrupt the balance of competing economic weapons long established in strike situations and substantially impair the employees' right to strike by adding to the risk of replacement the risk of loss of the bargaining representative." 125 L.R.R.M. at 1286.

Thus, in *Station KKHI* the Board decided to reject both the positive and negative presumptions regarding union support among replacement workers. The Board concluded that

> we can discern no overriding generalization about the views held by strike replacements and therefore we decline to maintain or create any presumptions regarding their union sentiments. Rather, we will review the facts of each case, but will require 'some further evidence of union non-support' before concluding that an employer's claim of good-faith doubt of the union's majority is sufficient to rebut the overall presumption of continuing majority status.

Id., citing *NLRB v. Pennco,* 684 F.2d at 343.

The Board's analysis in *Station KKHI* is compelling under the provisions of the basic statute. Some courts agree with the Board's position and have refused to attach presumptive significance to the hiring of replacement workers. *NLRB v. Windham Hospital,* 577 F.2d at 813-13. *NLRB v. Pennco,* 684 F.2d at 342. This *ad hoc* approach allows the Board to take into account the particular circumstances surrounding each strike and the hiring of replacements, while retaining the long-standing requirement that the employer must come forth with some objective evidence to substantiate his doubt of continuing majority status. *See NLRB v. Gulfmont Hotel Co.,* 362 F.2d 588, 592 (5th Cir.1966); *J. Ray McDermott & Co., Inc. v. NLRB,* 571 F.2d 850, 858-59 (5th Cir.), *cert. denied,* 439

U.S. 893, 99 S.Ct. 250, 58 L.Ed.2d 238 (1978). Moreover, the refusal to apply presumptions of union support or non-support to replacement workers is consistent with the Board's position regarding workers employed when a strike begins who also cross the picket line.[2]

The question before us, however, is not the subjective question the majority implicitly asks, whether the Board's policy is "correct." The refusal to attach any presumptive weight to the hiring of replacement workers is, at the very least, a reasonable policy choice which is not inconsistent with the National Labor Relations Act. As such, even if this Court prefers a different approach the only proper course is to enforce the Board's view because of the deference we are required to afford the Board's policy decisions.

The majority has nonetheless determined that we should reject the Board's policy as set out in *Station KKHI*. First, they contend that the Board did not really adopt a new standard in *Station KKHI,* but instead returned to the presumption that permanent replacements support the union in the same ratio as the workers they replaced, a position this Court rejected in *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir.1978). They conclude that "operationally the *Station KKHI* standard has

[2] The Board does not presume that the failure of original employees to join a strike indicates their lack of support for the union. *Windham Community Memorial Hospital,* 230 N.L.R.B. 1070 (1977), *enforced* 577 F.2d 805, 813-14 (2nd Cir.1978); *Skydyne Division of Brooks & Perkins, Inc.*, 282 N.L.R.B. No. 143, 124 L.R.R.M. (BNA) 1358 (1987); *Ashe Brick Co.*, 280 N.L.R.B. No. 162, 123 L.R.R.M. (BNA) 1023 (1986). It seems incongruous that the majority apparently accepts this proposition, which was applied by the Board in the present case, and at the same time concludes that when it is *replacement workers* who cross the picket line it should be presumed that they do not support the union.

the same effect as the presumption that striker replacements support the union . . . [because] the general presumption of continuing union majority still applies."

It is true, as the majority notes, that under both the Board's prior presumption of union support among replacement workers and its current neutral position announced in *Station KKHI,* an employer must come forward with some objective evidence regarding the replacement workers' failure to support the union. This does not mean, however, that the two standards are the same. What is different is the nature and amount of evidence required. The *Station KKHI* standard follows the general requirement that an employer must provide evidence of the lack of union support to substantiate his doubt of the union's majority status, and simply applies this long-standing rule in the context of an economic strike situation where replacements have been hired. In contrast, the Board's prior rule required more—in the face of a presumption that the replacement workers *did* support the union, the employer had to submit evidence of sufficient quantity and quality to prove that such support did not in fact exist. Stated more pragmatically, the new Board policy gives more flexibility to consider each situation on its own facts.

The majority also suggests that the Board's refusal to attach any presumptive significance to the hiring of replacement workers conflicts with the holding of this Court in *NLRB v. Randle-Eastern, supra.* In *Randle-Eastern,* we rejected the Board's positive presumption that replacement workers support the union in the same ratio as the employees they have replaced. The majority contends that we also held that the opposite, negative presumption that replacement workers do not support the union must apply.

While several courts did reject the Board's prior position that replacement workers do support the union in the same proportion of the employees, there is a conflict among the

circuits regarding the appropriate substitute for that policy.[3] Some courts approve the *Station KKHI* approach and permit the Board to refuse to presume that replacement workers are for or against the union. *NLRB v. Windham Hospital,* 577 F.2d at 813-14; *NLRB v. Pennco,* 684 F.2d at 342. Other circuits have specifically adopted the requirement of a negative presumption, also known as the Gorman presumption,[4] that replacement workers do

[3] *See Pennco, Inc. v. NLRB,* 459 U.S. 994, 103 S.Ct. 355, 74 L.Ed.2d 392 (1982) (denial of writ of certiorari to petitioner Pennco in *NLRB v. Pennco,* 684 F.2d 340 (6th Cir.1982), a case upholding a no presumption rule.) Justice White, joined by Justices Blackmun and Rehnquist, dissented from the denial of certiorari, noting that "[t]he questions of whether presumptions can properly be used to determine whether a union has the support of striker replacements, and whether replacements should be presumed to oppose the certified union or favor the certified union, have produced conflict among the courts of appeals and between the courts of appeals and the agency charged with enforcing the National Labor Relations Act." 459 U.S. at 996, 103 S.Ct. at 356.

[4] R. Gorman, Labor Law 112 (1976): "If a new hire agrees to serve as a replacement for a striker (in union parlance, a strike breaker, or worse), it is generally assumed that he does not support the union and that it ought not to be counted toward a union majority."

The Justices dissenting from the denial of certiorari in the *Pennco* case recognized that those circuits which "appear to presume that striker replacements do not support the certified union . . . seem to rely heavily on the statement made by one commentator, R. Gorman." The Justices then noted that Professor Gorman's original statement was supported only by a single citation to *Titan Metal Manufacturing Co.,* 135 NLRB 196 (1962), "a case that has neither been cited by the NLRB for the proposition Gorman states nor been expressly overruled." 459 U.S. at 995, 103 S.Ct. at 355.

As an astute labor law scholar, I expect that Professor Gorman would be among the first to disavow that policy under the National Labor Relations Act is to be made by a single-author textbook or even by the courts rather than by the NLRB itself. Further, as a generalization, the Gorman statement does not take into account the fact that

not support the union. *Soule Glass & Glazing Co. v. NLRB,* 652 F.2d 1055, 1109-10 (1st Cir.1981); *National Car Rental System, Inc. v. NLRB,* 594 F.2d 1203 (8th Cir. 1979).

Our opinion in *Randle-Eastern* does not place this Circuit within that latter category. The holding of *Randle-Eastern* is that the presumption that new workers support the union in the same ratio as the employees they have replaced "does not apply where the 'turnover' results from the replacement of strikers." 584 F.2d at 728. The rejection of this positive presumption, however, does not constitute the creation of the opposite, negative presumption that these workers do not support the union. *See Pennco,* 684 F.2d at 342; *Windham Hospital,* 577 F.2d at 813-14. While the *Randle-Eastern* decision did cite to Professor Gorman's treatise, the Gorman presumption was not made part of the court's holding.[5]

Even more significant and fully persuasive is the circumstance that *Randle-Eastern* is factually distinguishable from the present case. The *Randle-Eastern* court emphasized that the picket line violence and the union's insistence that the replacement workers would have to be discharged were factors which gave credence to the employer's belief that the replacement workers did not support the union.

some strike replacements sorely need the wages regardless of union sympathy (they are not drawing strike benefits as striking employees may be). Still others may approve of the union because of its important grievance procedures for example, even though they feel the particular strike is ill-advised.

[5] The *Randle-Eastern* court simply made reference to Professor Gorman's statement, but did not incorporate Gorman's position into the court's own pronouncement. 584 F.2d at 728. At its strongest, the court's reference to the Gorman presumption is equivocal. In the face of this ambiguity, *Randle-Eastern* is not properly construed as precluding the Board's *Station KKHI* policy.

584 F.2d at 723. It is highly unlikely that a replacement worker supports the Union if it is demanding that he be discharged and also is acting toward him with violence. These circumstances are totally absent in the case now before us. They militate against reading *Randle-Eastern* as establishing a general rule applicable in every strike situation where replacement workers are hired.[6]

Thus, *Randle-Eastern* is read much too broadly by the majority of the panel. Moreover, the Board's *Station KKHI* policy is not, as the majority contends, a mere restatement of the approach rejected in *Randle-Eastern*. Accordingly, I conclude we are bound to accept the Board's *Station KKHI* approach as a reasonable implementation of the policy of the law.

III. *The Board's Decision*

The preceding conclusion on the legal issue leads to the remaining issue of whether the NLRB's factual conclusions are supported by substantial evidence on the record considered as a whole. The Board concluded that the evidence of a lack of Union support offered by the Company was insufficient to rebut the well-established and unchallenged presumption of continuing majority status, and thus the Company's withdrawal of recognition violated § 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) and (5). In addition to the hiring of

[6] The *Randle-Eastern* decision is analogous to *Whisper Soft Mills, Inc. v. NLRB*, 754 F.2d 1381 (9th Cir.1984). While the Company would have us believe that the Ninth Circuit unambiguously adopted the Gorman presumption in *Whisper Soft Mills*, a reading of the case shows that this is not so. Instead, the court concluded that the Administrative Law Judge was correct in determining that the replacement workers did not support the union under the "unique circumstances" of the case: the union was demanding discharge of a majority of the replacement workers. 754 F.2d at 1388.

replacement workers, which the Board has determined is not a basis for presuming anti-union sentiment, the Company primarily relied on statements of dissatisfaction with the Union made by seven employees, one of whom was a replacement employee. The Company also argues that the fact that five employees failed to join the strike and the Union's inactivity indicated that the Union had lost its majority status. But consideration of the entire record shows that there is more than sufficient evidence to support the Board's determination that the Company did not meet its burden of establishing a reasonably grounded good faith doubt of the Union's continued majority status. This Court should act in accordance with our assigned role, therefore, by enforcing the Board's decision.

First, as the Board has long held, the fact that five out of twenty-seven original employees failed to join the strike is not persuasive evidence that these employees do not support the Union. *See supra* note 2. Moreover, the Board correctly refused to attach any significance to the fact that the Union was not in contact with the Company for a little more than a month after the strike began.[7] While it is true that an employer may be justified in withdrawing union recognition after a sustained period of union inactivity, it is well within the course of bargaining for a union to fail to put forth a new or compromise proposal for several months. The Union's decision not to contact the Company for approximately five weeks in no way provides evidence of a lack of majority support for the Union. *Windham*

[7] The Company argues that the Union's "inactivity" also serves as evidence of its good faith doubt of the union's majority status. This assertion is unrealistic in the real world of lawful strike activity. The Union was conducting a strike during nearly all of the period in question. The Company is referring to the fact that the Union did not immediately respond to every Company offer, and failed to contact the Company from June 12 to July 16, 1979.

Hospital, 577 F.2d at 814 ("the failure of the union to communicate with the [employer] during most of the summer months also does not provide grounds for doubt" of the union's majority status.)

It is clear that, absent any negative presumptions regarding replacement workers, the Company must rely on expressions of dissatisfaction with the Union made by seven employees to establish its good faith doubt of the Union's majority status. There is nothing in the record which should lead this Court to disturb the Board's conclusion that these statements are not sufficient evidence of a lack of majority support to justify a withdrawal of union recognition.

The Company makes much of the fact that a few employees who voiced complaints purported to speak for others, and asserted that other workers were dissatisfied with the Union. The Board has properly determined, however, that as a general rule such imputed representations of the opinions of others do not carry great weight. Otherwise, "a few anti-union employees could provide the basis for a withdrawal of recognition when in fact there is actually an insufficient basis for doubting the union's continued majority." *Golden State Habilitation Convalescent Center,* 224 N.L.R.B. 1618, 1619-20, enforcement denied on other grounds *sub nom. Dalewood Rehabilitation Hospital, Inc. v. NLRB,* 566 F.2d 77 (9th Cir.1977). There is no reason to disturb the Board's conclusion as to this contention.

The majority argues that the Company was justified in attaching "significant weight" to the comments of Chief Shop Steward Shady Goodson, who stated that he was having difficulty manning the strike and that only the Union, and not the employees, wanted the strike. Mr. Goodson expressly stated, however, that he was not speaking as a representative of the employees or the Union. The

Board was entitled to accept his disclaimer and give weight to his comments accordingly. It is for the Board to weigh evidence and pass on credibility, not for us. Moreover, Mr. Goodson's comments simply do not rise to the level of official union acknowledgement of a lack of union support which was exhibited in those opinions upon which the majority relies. *See e.g., Lodges 1746 and 743, Int'l Association of Machinists v. NLRB,* 135 U.S.App.D.C. 53, 57-58, 416 F.2d 809, 812-13 (1969), *cert. denied,* 396 U.S. 1058, 90 S.Ct. 751, 24 L.Ed.2d 752 (1970) (written memorandum by union's attorney flatly stating that the union did not enjoy a majority support); *Randle-Eastern,* 584 F.2d at 728 (company had been informed by a union representative that "50 to 25 or 20%" of the strikers would not be returning to work).

Finally, I note some parts of the record which the majority of the panel overlooks but which further support the Board's decision. First, several of the statements which the Company relies upon, including the statements of Mr. Goodson and the complaints regarding strike pay made by Mr. Blackshire, can legitimately be construed as objections to the strike itself or the way it is being conducted. Such statements do not necessarily constitute a rejection of the Union as a bargaining representative. *Windham Hospital,* 577 F.2d at 814. Moreover, while the Company and the majority both note that one replacement worker, Mr. Schneider, volunteered the opinion that the Union did not represent the employees and was not needed, they fail to point out that fourteen other replacement employees were interviewed in the same manner as Mr. Schneider, and none of them volunteered any animus toward or opposition to the Union.[8] The majority of the panel clearly

[8] Ms. Price, the director of employee relations who provided the Company with its information regarding Union support, conducted

intruded into the role of the Board when it gave substantial weight to the anti-union statements of this one replacement worker while ignoring the fact that fourteen other replacement workers were given exactly the same opportunity to speak and did not feel any stimulus to offer any thoughts pro or con as to the Union.

The bottom line is that the seven employees who voiced complaints about the Union were members of a bargaining unit of fifty. The Board could reasonably conclude that their dissatisfaction was not sufficient evidence to justify a conclusion that the Union has lost *majority* support. The majority of the panel does not afford the statutorily mandated power to the Board to decide this case as an adjudication based upon all the evidence. I cannot agree to usurping the Board's proper role in this manner. The majority makes of itself a super labor board rather than a reviewing court of appeals. I would therefore enforce the Board's order that the Company must recognize and bargain with the Union. I dissent.

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interviews of fifteen of the replacement workers on July 18-19, 1979 to see how they were coming along with their new jobs. She did not solicit comments regarding the Union.

Of the fifteen workers interviewed, only two mentioned the Union. One stated that "the Union thing did not enter his mind." The other, Mr. Schneider, voiced his assessment that the Union was not needed "as long as the Company treats him good." The failure of most replacement employees to state an opinion either way lends credence to the Board's position that these workers should not be presumed to be for or against the Union.

APPENDIX B

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 23–CA–7620

CURTIN MATHESON SCIENTIFIC, INC.

AND

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 968, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO[1]

DECISION AND ORDER

On 20 November 1980 Administrative Law Judge Martin S. Bennett issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief opposing the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[2] and briefs and has decided to

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[1] On 1 November 1987 the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

[2] The General Counsel excepted to the judge's denial of a motion to amend the complaint filed by the General Counsel after the hearing in this matter. We affirm the judge's disposition of the motion for the reasons stated in fn. 1 of his decision.

affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint in this proceeding alleges that the Respondent committed three violations of Section 8(a)(5) and (1); an unlawful withdrawal of recognition of the Union as the collective-bargaining representative of the Respondent's unit employees; an unlawful failure to furnish relevant and necessary information requested by the Union; and an unlawful refusal to execute a written contract embodying the collective-bargaining agreement reached by the parties. The judge dismissed the entire complaint based on his finding that the Respondent had a reasonably based, good-faith doubt of the Union's majority status at the time it withdrew recognition. We disagree, finding that the evidence supporting the Respondent's asserted good-faith doubt is insufficient to rebut the presumption of the Union's continuing majority status. Further, we conclude that the Respondent violated Section 8(a)(5) and (1) as alleged in the complaint.

1. Withdrawal of recognition

A 3-year collective-bargaining agreement between the parties expired on 21 May 1979.[3] On 25 May, during the negotiations for a new contract, the Respondent made its last offer to the Union, the parties stipulating that the proposal was for a complete collective-bargaining agreement. On 29 May the Union rejected the Respondent's 25 May offer. About 4 June the Respondent instituted a lockout of all 27 bargaining unit employees. On 12 June the Respondent terminated the lockout and renewed its offer of 25 May.[4] On the same day the Union again rejected the 25 May offer.[5] On 13 June the Union commenced an economic strike which lasted until about 16 July. Of the 27 bargaining unit employees who had previously been locked out, 22 initially took part in the strike, and 5 crossed the picket line to return to work. The record contains no evidence of any picket-line or other strike-related violence or threats during the course of the strike.

[3] All dates are in 1979 unless otherwise indicated. The Union was certified by the Board on 15 April 1970 as the exclusive representative of a unit of the Respondent's production and maintenance employees, and the parties stipulated that this was the unit covered by the agreement which expired 21 May 1979.

Elizabeth Price, the Respondent's director of employee relations, testified that about the time the strike began, she had two discussions with employee Tony Lopez, one of the five who had crossed the picket line. Lopez told Price in these conversations that the Union had done nothing for the employees, and that the Union's business representative was not doing his job. Lopez, not a union member, further stated that he had not paid union dues in the past and would not pay them because he would not support the Union in any way. Also about this time, Price testified that she had a conversation with employee Bill Lee, another of the five who had crossed the picket line at the beginning of the strike. Lee, also not a union member, told Price that he was not paying union dues and did not intend to because he did not support the Union and believed that the Union had not done anything for the employees.

[4] The parties stipulated at the hearing that the legality of the lockout was not at issue, and thus it is not before us. The dates for the beginning and end of the lockout are taken from the record, and we correct the judge's errors in this regard.

[5] Subsequently, on 17 June, the Respondent implemented the wage aspect of its 25 May proposal based on its perception of an impasse in negotiations. This conduct was not alleged as an unfair labor practice.

Price further testified that later, on 19 June, employee and Chief Shop Steward Shady Goodson crossed the picket line to speak with her and Jim Crocker, another management official. Goodson said that he felt he was in the middle of an uncomfortable situation because only the Union itself, and not the employees, wanted the strike. He also stated that he was having difficulties convincing the striking employees to man the picket line and that the Union was not providing enough assistance in maintaining the picket line. He also said that some other striking employees felt the same way that he did.[6] Subsequently, Goodson requested reinstatement, and still later, on 19 July, he resigned from the Respondent's employ.

On 27 June, according to Price's testimony, employee and former shop steward J. R. Blackshire crossed the picket line to request reinstatement. He spoke with Price and Tim Martin, another management official. He expressed anger with the Union because, initially, the Union did not pay him to walk the picket line, and then, when it did, it deducted union dues from the payment. After this discussion, Blackshire went into the Respondent's warehouse to talk to friends who were working there. After a few minutes, he called Price over. He stated that there was no union anymore, that people were not supporting it. He also said that there were other striking employees who wanted to return to work.

Price also testified that in early July, employee Clint Waller crossed the picket line to speak with her and

[6] It is is apparent from the record that Goodson was a member of the Union's negotiating committee as well as a chief shop steward. However, according to the uncontradicted testimony of Crocker, which generally corroborated Price's version of the 19 June meeting, Goodson opened the conversation by stating that he was there on his own and not as a representative of union employees or the Union itself.

Crocker. Waller said that he had not been manning the picket line and would not do it because he was upset with the Union. He stated that he felt that the Union was not representing the employees. He said that he would like "this thing," apparently the strike, to be over with, and he wanted Price and Crocker to know that. He also indicated that the intended to withdraw from membership in the Union and he wanted to know how that would affect his unemployment benefits. Price further testified that subsequently, at some point prior to 20 July, Waller notified the Respondent by telephone that he had resigned from the Union.[7]

On 12 July, according to Price, employee Raymond Brunner crossed the picket line to talk with her and Martin. He stated that he had decided to retire because he did not want to have anything to do with the Union again; he repeated several times during the conversation that he did not want to have to work with the Union any more.[8]

On 16 July the Union, on behalf of the striking employes, made an unconditional offer to return to work, thereby ending the strike. Later on the same day, the Union notified the Respondent that the bargaining unit employees had accepted the Respondent's 25 May collective-bargaining proposal. On 19 July the Union requested that the Respondent provide notification of its availability to execute the collective-bargaining agreement reached between the parties.

A few weeks earlier, on 25 June, the Respondent had hired 29 new employees as permanent replacements for the

[7] On 23 July the Respondent received a letter from Waller, dated 19 July, confirming his earlier telephone message that he had resigned from the Union.

[8] The record is not clear whether or when Brunner actually retired from the Respondent's employ.

22 unit employees on strike.[9] There is no evidence that the Union attempted to contact any of the replacements during the strike. Price testified that, beginning around mid-July, she had individual discussions with 12 or 13 of the replacement employees. On 19 July she spoke with replacement employee David Schneider. Schneider told her that he had worked in situations where he had been a union member and he had worked in nonunion situations and, from what he could see, he did not think that this Union represented the employees, and it just was not needed at the Company.

On 20 July the Respondent, in reply to the Union's 16 July statement of acceptance of the Respondent's last bargaining proposal, notified the Union that that proposal, which the Union had previously rejected, was no longer available. In the same communication, the Respondent stated that it doubted that the Union had the support of a majority of the bargaining unit employees, and on that basis it declined to recognize or bargain with the Union as the employees' representative. Also on 20 July, Robbie Madison, a bargaining unit member when the strike began, resigned from the Respondent's employ. The record does not indicate whether the Respondent knew about or relied on Madison's resignation at the time it withdrew recognition of the Union.

In addition, according to the complaint allegations, about 20 July, the Union requested that the Respondent furnish information regarding the total number of bargaining unit employees then on its payroll and the job classification and seniority date of each such employee. In its answer to the complaint, the Respondent stated that it had received the Union's information request and that thereafter it had refused to provide the information. In its posthearing brief to the judge and in its brief to the Board opposing the General Counsel's exceptions, the Respondent stated that its refusal was based on its doubt of the Union's majority support.

[9] Price testified that 29 replacements were hired although only 22 jobs had been opened up by the strike because the Respondent anticipated that some of the hirees would not cross the picket line, that there would be some turnover within a group of new employees that large, and that additional workmen would be needed during the initial training period. The record indicates that several replacements were terminated within a few weeks.

As of 20 July, the date of the Respondent's withdrawal of recognition, the record indicates that 25 strike replacements and the 5 employees who had initially crossed the picket line were working for the Respondent in the bargaining unit. There were also approximately 20 unit employees who had formerly been strikers and who had requested reinstatement, thus making a total of approximately 50 employees in the unit.[10]

The judge, crediting Price's testimony generally, dismissed the complaint in its entirety on his finding that the Respondent had acquired a reasonable, good-faith doubt of the Union's majority status by 20 July and had accordingly made a valid withdrawal of recognition. In reaching his conclusion, the judge relied on certain of the circumstances related above, and especially the individual statements the employees made to Price. Contrary to the judge, we find the record evidence on which the Respondent depended to support its doubt of the Union's majority status insufficent to justify its withdrawal of recognition.

[10] In the evaluation of a union's continuing majority status, striking employees, even if permanently replaced, and their replacements are included in the bargaining unit. See, e.g., *Whisper Soft Mills v. NLRB*, 754 F.2d 1381 fn. 8 (9th Cir. 1985).

In *Station KKHI*, 284 NLRB No. 113 (July 27, 1987), we had occasion to reaffirm the essential principles controlling this area of the law:

> Absent unusual circumstances, there is an irrebutable presumption that a union enjoys a majority status during the first year following its certification. On expiration of the certification year, the presumption of majority status continues but may be rebutted. An employer who wishes to withdraw recognition after a year may do so in one of two ways: (1) by showing that on the date recognition was withdrawn the union did not in fact enjoy majority status, or (2) by presenting evidence of a sufficient objective basis for a reasonable doubt of the union's majority status at the time the employer refused to bargain.

Id., slip op. at 4 (footnote citations omitted). As previously indicated, the Respondent's defense of its withdrawal of recognition is based on the second method above. The objective, evidentiary factors presented by the Respondent to support its reasonable doubt of the Union's majority status are: the fact that 5 of the original 27 bargaining unit employees crossed the picket line at the beginning of the strike; the resignations from its employment of employees Goodson and Madison; the hiring of 29 strike replacements; and the statements made to Price by employees Goodson, Lopez, Lee, Blackshire, Brunner, Waller, and Schneider, which assertedly demonstrate repudiations of the Union as the employees' collective-bargaining representative.

We note at the outset that the fact that 5 of the 27 unit employees crossed the picket line does not in itself support an inference that the 5 repudiated the Union as the collective-bargaining representative. The failure of employees to join an economic strike may indicate their

economic concerns rather than a lack of support for the union. See, e.g., *NLRB v. Pennco*, 684 F.2d 340, 342 (6th Cir. 1982), cert. denied, 459 U.S. 994 (1982); *Station KKHI*, above, slip op. at 16. Further, Shady Goodson's statements to Price on 19 June, whether speaking for himself or for others, conveyed only a disapproval of the Union's conduct of the strike; he made no broader expression which could be reasonably interpreted as a repudiation of the Union as the employees' representative. See, e.g., *NLRB v. Windham Memorial Hospital*, 577 F.2d 805, 814 (2d Cir. 1978). In addition, Goodson's resignation from employment, as well as Robbie Madison's (assuming the Respondent was aware of it when it withdrew recognition), operated only to reduce by two the size of the bargaining unit as of the date of withdrawal of recognition.

With respect to the Respondent's reliance on the hiring of 29 strike replacements, we note first that there were 25, and not 29, still working when recognition was withdrawn. Concerning the effect of the employment of strike replacements on the overal presumption of the Union's continuing majority status, we stated in *Station KKHI*, above, that we will not use any presumptions with respect to their union sentiments; instead, we will take a case-by-case approach, and we will require additional evidence of a lack of union support on the replacements' part in evaluating the significance of this factor in the employer's showing of good-faith doubt. Id., slip op. at 17-18. In this case, the apparently peaceful picket line the replacements crossed and the Union's apparent failure to contact them during the strike do not provide a basis for inferring their union sentiments, as these matters are "common to the hiring of replacements." Ibid. The only affirmative evidence the Respondent produced regarding any replacement employee's views of the Union is the conversation between

Price and replacement employee Schneider. We treat the content of Schneider's remarks below, but we note at this point that Schneider was one replacement employee, speaking for himself, of a total of 25. Thus, we have no showing with respect to the views of other replacements and no evidentiary basis for reasonably inferring the union sentiments of the replacement employees as a group.[11]

It is apparent that the essence of the Respondent's good-faith doubt defense is the effect of the statements made to Price by employees Blackshire, Lopez, Lee, Brunner, Waller, and Schneider concerning their views of the Union. It may be that some of these statements constituted rejections of the Union as bargaining representative; the import of others, however, appears ambiguous at best. In any event, we see no need to determine whether these statements in fact constitute individual repudiations of the Union as the collective-bargaining representative. Even attributing to them the meaning most favorable to the Respondent, it would merely signify that 6 employees of a total bargaining unit of approximately 50 did not desire to

[11] In *NLRB v. Randle-Eastern Ambulance Service*, 584 F.2d 720 (5th Cir. 1978), the court determined that the employment of strike replacements, as well as the fact that a number of employees renounced the strike and crossed the picket line, contributed to a finding that the company had presented sufficient evidence of its good-faith doubt to make a valid withdrawal of recognition of the union. The Respondent relies on this decision in making its own good-faith doubt contentions. The court in *Randle-Eastern* inferred that the employees did not support the union in light of, inter alia, violence directed against those who crossed the picket line and the union's negotiating position that the strike replacements would have to be discharged to make room for striking employees when the strike was over. Id. at 728. We note that these two circumstances in particular, as well as others the court relied on, are not present in the instant case.

keep the Union as the collective-bargaining representative.[12]

Taking into account all the factors relied on by the Respondent to support its asserted reasonable doubt of the Union's majority status, i.e., the five employees who initially crossed the picket line, the resignations of two employees, the employment of strike replacements, and the individual employee statements concerning the Union, we conclude that the evidence is insufficent to rebut the presumption of the Union's continuing majority status. Accordingly, the Respondent's withdrawal of recognition of the Union on 20 July violated Section 8(a)(5) and (1). See, e.g., *Bickerstaff Clay Products*, 286 NLRB No. 27 (Sept. 30, 1987); *Station KKHI*, supra.

2. Refusal to supply information

Concerning the Respondent's alleged refusal to comply with the Union's 20 July information request, it is clear

[12] With respect to former shop steward Blackshire, to the extent that his remarks to Price on 27 June purported to represent the views of employees other than himself, we assign very little weight to them, because his statement that "people" were not supporting the Union any more was vague, and, more importantly, if we found otherwise, "a few antiunion employees could provide the basis for a withdrawal of recognition when in fact there is actually an insufficient basis for doubting the Union's continued majority." *Golden State Habilitation Convalescent Center*, 224 NLRB 1618, 1619-1620 (1976), enf. denied on other grounds sub nom. *Dalewood Rehabilitation Hospital v. NLRB*, 566 F.2d 77 (9th Cir. 1977); see also *Louisiana-Pacific Corp.*, 283 NLRB No. 161 (May 21, 1987), slip op. at fn. 6 (Chairman Dotson, in dissent, would have dismissed the complaint on the basis of the totality of the evidence), *Silver Spur Casino*, 270 NLRB 1067, 1074-1075 (194). In addition, Blackshire's tenure as a shop steward, having expired prior to the events in this case, provides no basis for imputing to him special knowledge of employees' current union sentiments. See *Louisiana-Pacific Corp.*, supra, slip op. at fn. 6.

from the Respondent's admissions in both its answer to the complaint and its briefs that its conduct in this regard was based on its asserted doubt of the Union's status as the employees' representative. In light of our finding above that the Respondent's withdrawal of recognition of the Union violated the Act, its subsequent refusal to supply the requested information cannot stand. An employer is obligated to provide the employees' bargaining representative with information that is necessary and relevant to fulfill its statutory collective-bargaining function. See generally *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). A union's information request bearing on the terms and conditions of employment of bargaining unit employees is presumptively relevant. See, e.g., *Fairfield Daily Republic*, 275 NLRB 7 (1985); *Pfizer, Inc.*, 268 NLRB 916 (1984), enfd. 763 F.2d 887 (7th Cir. 1985). Here, the Union specifically requested that the Respondent provide information with respect to the total number of bargaining unit employees on its payroll and each such employee's job classification and seniority date. This information is presumptively relevant and the Respondent's refusal to furnish it to the Union violated Section 8(a)(5) and (1). See, e.g., *Bickerstaff Clay Products Co.*, supra.

3. Refusal to execute the agreement

Regarding the Respondent's alleged refusal to execute a written collective-bargaining agreement, the record is clear that the Respondent proposed a complete collective-bargaining agreement on 25 May. The Union rejected this offer on 29 May and again on 12 June after the Respondent renewed its offer. On 16 July, following an economic strike and the Union's unconditional offer to return to work, the Union stated its acceptance of the 25 May proposal; and on 19 July, the Union requested that the Respondent execute a written contract embodying the agreement reached on the basis of the 25 May proposal. On 20 July, the Respondent informed the Union that the 25 May proposal which the Union had rejected was no longer available for acceptance. The record also clearly indicates that the Respondent never expressly withdrew the 25 May offer prior to the Union's acceptance on 16 July.

The Respondent defends its conduct on grounds of "basic contract law," i.e., the proposition that a contractual offer is terminated on rejection and is not subsequently available to the rejecting party for acceptance. Alternatively, the Respondent asserts that the failure of the strike constituted a change of bargaining circumstances which operated as a withdrawal of the 25 May proposal.

The principles of law in this matter are well established. Technical rules of contract law do not necessarily control regarding the making of collective-bargaining agreements. Generally, a complete collective-bargaining proposal remains viable, even if previously rejected, and, on acceptance, must be executed in accordance with Section 8(d), unless, prior to acceptance, the offer is expressly withdrawn or a change in circumstances leads to a reasonable conclusion that the offer has been withdrawn. *Ben Franklin National Bank*, 278 NLRB No. 136 (Mar. 17, 1986), JD slip op. at 13 and cases there cited. Here, the 25 May offer, although twice rejected, was never expressly withdrawn and remained open for acceptance as of 16 July. On that date the Union did accept the 25 May offer, the parties thereby reaching agreement on a complete collective-bargaining contract. The apparent failure of the strike did not amount to a change in negotiating circumstances sufficient for the parties reasonably to view the proposal as effectively withdrawn. See, e.g., *Pepsi Cola Bottling Co. v. NLRB*, 659 F.2d 87, 90 (8th Cir. 1981); *Ben Franklin National Bank, supra, JD slip op.*

at 16.[13] On 19 July the Union requested execution of a written contract incorporating the agreement reached, thus activating the Respondent's 8(d) duty to do so. By refusing to execute a written contract the Respondent violated Section 8(a)(5) and (1). *Bickerstaff Clay Products Co.*, supra; *Ben Franklin National Bank,* supra.

Conclusions of Law

1. Respondent Curtin Matheson Scientific, Inc. is an employer whose operations affect commerce within the meaning of Section 2(6) and (7) of the Act.

2. General Drivers, Warehousemen and Helpers, Local 968, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. On 15 April 1970 the Union was certified by the Board as the exclusive collective-bargaining representative of the employees employed in the following described unit appropriate for the purposes of collective bargaining:

> All production and maintenance employees, including truck drivers and city sales employed at 4220 Jefferson, Houston, Texas. Excluded are all other employees, including office clerical employees, service repairmen, telephone sales, outside salesmen, guards, watchmen, laboratory personnel, and supervisors as defined in the Act.

[13] Cf., *NLRB v. Randle-Eastern Ambulance Service*, above, relied on by the Respondent, in which the court, rejecting a bad-faith bargaining theory, found that the company had not violated the Act by *expressly withdrawing* its previous proposals in light of a change in relative bargaining strengths in the context of a strike.

4. By withdrawing recognition of the Union as the representative of the employees in the unit described above on 20 July 1979, the Respondent violated Section 8(a)(5) and (1) of the Act.

5. By failing and refusing to furnish the Union with the information requested by it on or about 20 July, the Respondent violated Section 8(a)(5) and (1) of the Act.

6. By failing and refusing to execute a written contract embodying the collective-bargaining agreement reached by the parties on 16 July 1979, the Respondent violated Section 8(a)(5) and (1) of the Act.

7. The unfair labor practices above constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To remedy the Respondent's unlawful withdrawal of recognition of the Union, we shall order the Respondent to recognize and, on request, bargain with the Union concerning the terms and conditions of employment of the bargaining unit employees. To remedy the Respondent's unlawful refusal to provide the information requested by the Union, we shall order the Respondent to provide the specific information sought by the Union on or about 20 July 1979, if the Union so requests.

With respect to the Respondent's unlawful refusal to execute the agreement reached on 16 July 1979, it is apparent that that agreement will have expired prior to the issuance of this decision. Accordingly, to remedy effectively the unfair labor practices found herein, we shall order the Re-

spondent to execute that agreement, if the Union so requests, and give retroactive effect to its terms and conditions, and make the bargaining unit employees whole for losses, if any, they may have suffered as a result of its refusal to sign such agreement,[14] backpay for employees to be computed in accordance with the method stated in *Ogle Protection Service*, 182 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest to be computed in the manner prescribed in *New Horizons for the Retarded.*[15] We shall further order that if the Union does not request that the Respondent execute the agreement reached on 16 July 1979, the Respondent shall, on request, bargain in good faith with the Union concerning the terms and conditions of an agreement, and, if an agreement is reached, execute a written contract incorporating such agreement. See, e.g., *Parkview Furniture Mfg. Co.*, 284 NLRB No. 105 (July 13, 1987); *Worrell Newspapers*, 232 NLRB 402 (1977).

ORDER

The National Labor Relations Board orders that the Respondent, Curtin Matheson Scientific, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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[14] We note here, for its possible effect on our make-whole remedy, the Respondent's implementation of the wage aspect of its final offer on 17 June 1979.

[15] In accordance with our decision in *New Horizons for the Retarded,*, 283 NLRB No. 181 (May 28, 1987), interest on and after 1 January 1987 shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to 1 January 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621) shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

(a) Refusing to bargain by withdrawing recognition of the Union as the exclusive bargaining representative of the Respondent's employees in the following unit:

> All production and maintenance employees, including truck drivers and city sales employed at 4220 Jefferson, Houston, Texas. Excluded are all other employees, including office clerical employees, service repairmen, telephone sales, outside salesmen, guards, watchmen, laboratory personnel, and supervisors as defined in the Act.

(b) Refusing to bargain by refusing to furnish the information requested by the Union about 20 July 1979 concerning the total number of bargaining unit employees on its payroll and the job classification and seniority date of each such employee.

(c) Refusing to bargain by refusing to execute a written contract embodying the collective-bargaining agreement reached between the parties on 16 July 1979.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize the Union as the exclusive collective-bargaining representative of the employees in the unit set out above and bargain in good faith with the Union at its request concerning the unit employees' terms and conditions of employment.

(b) Furnish the Union on request the information it sought on or about 20 July 1979.

(c) On request, sign a collective-bargaining agreement containing the terms and conditions of employment agreed to between the Respondent and the Union on 16 July 1979 and give retroactive effect to its terms and

conditions, and make its employees whole, with interest, for losses, if any, they may have suffered as a result of its refusal to sign such agreement.

(d) If no such request is made, bargain collectively in good faith with the Union, at its request, over the terms and conditions of a new collective-bargaining agreement and, if an agreement is reached, sign a written contract embodying such agreement.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Houston, Texas facility copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 23, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. 16 December 1987

Donald L. Dotson, Chairman

James M. Stephens, Member

Mary Miller Cracraft, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT withdraw recognition of the Union, General Drivers, Warehousemen and Helpers, Local 968, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, as the exclusive collective-bargaining representative of our employees in the following unit:

> All production and maintenance employees, including truck drivers and city sales employed at 4220 Jefferson, Houston, Texas. Excluded are all other employees, including office clerical employees, service repairmen, telephone sales, outside salesmen, guards, watchmen, laboratory personnel, and supervisors as defined in the Act.

WE WILL NOT refuse to furnish the information requested by the Union about 20 July 1979 concerning the total number of bargaining unit employees on the payroll and the job classification and seniority date of each such employee.

WE WILL NOT refuse to execute a written contract embodying the collective-bargaining agreement reached between ourselves and the Union on 16 July 1979.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize the Union as the exclusive collective-bargaining representative of the employees in the unit set out above and WE WILL bargain in good faith with the Union on request concerning the unit employees' terms and conditions of employment.

WE WILL furnish the Union on request the information it requested on or about 20 July 1979.

WE WILL, on request, sign a collective-bargaining agreement containing the terms and conditions of employment agreed to between ourselves and the Union on 16 July 1979, WE WILL give retroactive effect to its terms and conditions, and WE WILL make the unit employees whole, with interest, for losses, if any, they may have suffered as a result of our refusal to sign such agreement.

WE WILL, if no such request is made, bargain collectively in good faith with the Union, on its request, over the terms and conditions of a new collective-bargaining agreement and, if an agreement is reached, WE WILL sign a written contract embodying such agreement.

CURTIN MATHESON SCIENTIFIC, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Bob Casey Federal Building/Courthouse, Room 4014, 515 Rusk Street, Houston, Texas 77002, Telephone 713-229-7755.

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

Case No. 23-CA-7620

CURTIN MATHESON SCIENTIFIC, INC.

and

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL 968, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA

Bernard L. Middleton and *Ernest Duran,* for the General Counsel.
Howard Reed, of Houston, Texas, for the Union.
Andrews, Kurth, Campbell & Jones, by *Clinton S. Morse* and *Donald Horton,* of Houston, Texas, for Respondent.

DECISION

Statement of the Case

MARTIN S. BENNETT, Administrative Law Judge: This matter was heard at Houston, Texas on June 10, 1980.

The complaint, issued September 7 and based upon a charge filed July 30, 1979, by General Drivers, Warehousemen & Helpers, Local 968, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein the Union, alleges that Respondent, Curtin Matheson Scientific, Inc. has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act. Able briefs have been submitted by the General Counsel and Respondent.[1]

Upon the entire record in the case, and from my observation of the witnesses including their demeanor, I make the folowing:

Findings of Fact

I. Jurisdictional Findings

Curtin Matheson Scientific, Inc. is a Delaware corporation with its principal office and place of business located in Houston, Texas where it is engaged in the business of buying and selling laboratory instruments and supplies. It annually purchases and receives goods and materials valued in excess of $50,000 which are shipped to its facilities in Texas directly from points located outside that State. I find that the operations of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

General Drivers, Warehousemen & Helpers, Local 968, affiliated with International Brotherhood of Teamsters,

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[1] A motion by the General Counsel to amend the complaint, initially raised in its brief, without any advance notice of any nature, is hereby denied because, as later urged by Respondent, I deem this to constitute a lack of due process.

Chauffeurs, Warehousemen & Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *Introduction*

Attacked herein is the fact that, after rejecting an offer of a contract by Respondent, the Union thereafter changed its mind, and decided to accept said contract. Further attacked is the fact that Respondent next refused to execute such a written contract, withdrew recognition from the Union, and attacked its representative status on the basis that it had a good-faith doubt of its majority representation. Accompanying the foregoing is the fact that Respondent thereafter refused to submit certain information to the Union with respect to the total number of bargaining unit employees, their classifications and their seniority dates. In essence, this comes down to whether, on the dates crucial herein, Respondent entertained a good-faith doubt as to the representative status of the Union among its employees.[2]

A strike commenced on June 13, 1979[3] and the parties on the record stipulated that on June 14 there was a legal lockout of the strikers by Respondent which is not in issue herein.[4]

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[2] The unit involved includes all production and maintenance employees, including truck drivers and city sales employees at Houston, but excludes all other employees including office clericals, service repairmen, telephone sales personnel, outside salesmen, guards, watchmen, laboratory personnel, and supervisors. The appropriateness of this unit within the meaning of Section 9(b) of the Act is not denied and I so find.

[3] All dates are in 1979, unless otherwise indicated.

[4] Page 28 of the transcript.

The parties met again on June 12, Respondent renewed its last contract offer of May 25 and also notified the Union that the lockout was threatened as of that date. This led to the strike of June 13.

On July 16 the Union notified Respondent that the employees had voted to accept Respondent's offer of May 25. The parties agreed that although the Union was still the exclusive bargaining representative as of June 12 and that as of July 19 the Union requested Respondent to execute the contract embracing its last rejected offer; Respondent has refused to do so since July 20.

There is substantial evidence, which I credit, that five of the bargaining unit employees crossed the picket line and attempted to return to work.

Early in the strike, Elizabeth Price, Director of Employee Relations, in my observation a most forthright and credible witness, commenced receiving reports about employee dissatisfaction with the Union and, moreover, a desire not to be represented by said labor organization.

Price testified that Tony Lopez, who crossed the picket line, had volunteered that the Union was doing nothing for the employees and that Business Agent Reed was not representing the employees adequately. Several days later Lopez expressed an opinion as to Reed's lack of ability in regulating the employees.

Employee Bill Lee has crossed the picket line and volunteered to Price his dissatisfaction with the Union and its representation of the employees; Price so testified and I credit her testimony. Lee further testified that Chief Shop Steward Goodson requested a meeting with Jim Crocker of Respondent's International Division. Goodson crossed the picket line and met with Price and Crocker in the office of the latter. He expressed himself to the effect that Business Agent Reed wanted to strike and that the Union had difficulty manning the picket line. Price, as the record

reflects, and I so find, made immediate notes of this meeting.

On June 25, Respondent hired 29 new employees replacing all of the 22 or 23 strikers who had totaled some 27 in the bargaining unit. Respondent understandably anticipated some termination in the replacements.

On June 27 former shop steward J. R. Blackshire requested a meeting with Price. He duly met with her and Tim Martin. He expressed concern over the fact that he had been on vacation when the lockout commenced and expressed dissatisfaction with the fact that the Union was not paying people to picket. He stated further that the Union was doing nothing for the employees and that he could not "support" such a labor organization. Indeed, at the end of the meeting he requested reinstatement. I hardly deem this to constitute evidence of his support of this labor organization and so find.

B. *Discussion*

The issue in this case is whether Respondent had a good-faith doubt of the Union's majority status at the time Respondent withdrew recognition of the Union. The current thinking of the courts, and to some extent the Board, honors the good-faith doubt defense to a Section 8(a)(5) unfair labor practice charge. In view of the plethora of cases where various Circuit Courts have found that defense applicable.[5] [*sic*] I am constrained to accept Respondent's defense.

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[5] See, e.g., District of Columbia Circuit hearing a Florida case in *Peoples Gas System, Inc.* v. *N.L.R.B.*, __ F.2d __, 104 LRRM 2224 (C.A. D.C., 1980); Fifth Circuit in *N.L.R.B.* v. *Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (C.A. 5, 1978); Seventh Circuit in *Bellwood General Hospital, Inc.* v. *N.L.R.B.*, 627 F.2d 98 (C.A. 7, 1980) and *N.L.R.B.* v. *Key Motors Corp.*, 579 F.2d 1388 (C.A. 7, 1978); Eighth Circuit in *National Car Rental Systems, Inc.* v. *N.L.R.B.*, 594 F.2d 1203 (C.A. 8, 1979); Ninth Circuit in *Golden State Habilitation Center* v. *N.L.R.B.*, 556 F.2d 77 (C.A. 9, 1977); Tenth Circuit in *Burns International Security Services* v. *N.L.R.B.*, 567 F.2d 945 (C.A. 10, 1977).

The Board has also recognized the defense. See, e.g., *Upper Mississippi Towing Corp.*, 246 NLRB No. 41 (1979); *Cadillac Manufacturing Corp.*, 232 NLRB 586 (1977); and *Arkay Packaging Corp.*, 227 NLRB 397 (1976).

It is well established that the majority status of a union is conclusively presumed to continue for one year after the union is certified. After the certification year has ended a union enjoys a rebuttable presumption that its majority status continues and this presumption applies after the expiration of the collective-bargaining agreement. In refusing to bargain with a union after the expiration of the first year following certification, an employer violates Section 8(a)(5) unless it can overcome the presumption of majority support by affirmatively establishing that either (1) at the time of the withdrawal of recognition the union had lost its majority status, or (2) the employer had, in good faith, a reasonably-based belief that the union had lost its majority status, and that such belief was based on objective considerations and was raised in a context free of employer unfair labor practices.[6]

The Union was certified as the exclusive collective-bargaining representative of Respondent's production and maintenance employees on April 15, 1970. The last collective-bargaining agreement between the Union and Respondent expired on May 21, 1979. Therefore the Union enjoyed a rebuttable, as opposed to an irrebuttable, pre-

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[6] *Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954); *N.L.R.B.* v. *Randle-Eastern Ambulance Service, Inc.*, *supra*; *Burns International Security Services* v. *N.L.R.B.*, *supra*, and *Celanese Corporation of America*, 95 NLRB 664, 673 (1951).

sumption of majority status. Respondent does not claim to rebut the presumption by the first method stated above (i.e., that the Union had, in fact, lost its majority status), but instead relies on the second method of rebuttal—that it had a reasonably-based, good-faith doubt of the Union's majority status.

Counsel for the General Counsel contends that Respondent did not have a reasonably-based, good-faith doubt of the Union's majority status. There is no assertion that the defense was raised in a context of employer unfair labor practices; in fact, there is no allegation that Respondent committed any independent unfair labor practices.

I conclude that events both prior and subsequent to the Union's July 16 attempt to accept Respondent's May 25 proposals rebut the presumption of majority status. I find that these events were sufficient to establish a reasonably-based, good-faith doubt of the Union's majority status.[7]

By June 27 Respondent based its doubt on several facts. On June 13 five[8] of the 27 old bargaining unit employees crossed the picket line, 2 of those 5 expressed nonsupport for the Union.[9] Shady Goodson[10] reported to Respondent that the employees did not support the strike, that they felt the strike was based on the hostility of the Union's Business Agent, Howard Reed, and that the Union had difficulty manning the picket line. On June 27 former Shop

[7] Much of the evidence on this subject is based on the testimony or notes of Elizabeth Price. Price impressed me as a forthright and credible witness and I credit her testimony.

[8] The five were Bill Lee, Tony Lopez, Gilbert Ozuniga, Sandra Hutto, and Alvin Harper.

[9] Bill Lee and Tony Lopez.

[10] Goodson was the Chief Shop Steward and a member of the Union's Negotiating Committee.

Steward J. R. Blackshire met with Price at Respondent's offices and stated that he did not support the Union, that the Union had lost the support of the employees in the unit, and that he and many others wanted to return to work.[11] On June 28 Goodson made an unconditional request for reinstatement.

In the early part of July two other employees expressed strong dissatisfaction with the Union. On July 11 Raymond Brunner met with Price and Respondent's representative Tim Martin. Brunner stated that he wanted to retire because he did not want to work with the Union again. Also in the first part of July Clint Waller met with Price and Jim Crocker, Operations Manager of the International Division, at which he also expressed strong dissatisfaction with the Union and stated his desire to withdraw from membership. On July 19 Waller sent a confirming letter to Price's office that confirmed his lack of support for the Union. The letter included a copy of a letter addressed to the Union, dated July 19, which stated in part, "I wish not to be a member of the Teamsters no longer at Curtin Matheson Scientific, Inc. or anywhere else."[12]

Three other events occurred after the Union attempted acceptance of Respondent's May 25 proposals, and before Respondent withdrew recognition on July 20. Goodson resigned on July 19. Also on July 19, striker replacement David Schneider told Price that the Union did not support the employees. On July 20, Robbie Madison resigned.

Based on the foregoing findings of fact, I conclude that Respondent had a reasonably-based, good-faith doubt of

[11] Blackshire made several statements to the effect that "there wasn't a Union anymore" and that the Union "had lost all their support from the employees in the unit." [Tr. p. 40]

[12] Respondent's Exh. 10(b).

the Union's majority status. I therefore recommend dismissal of the complaint.

Conclusions of Law

1. Curtin Matheson Scientific, Inc. is an employer whose operations affect commerce within the meaning of Section 2(6) and (7) of the Act.
2. General Drivers, Warehousemen & Helpers, Local 968, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[13]

ORDER

The complaint is dismissed in its entirety.

Dated: November 20, 1980

/s/ Martin S. Bennett
MARTIN S. BENNETT
Administrative Law Judge

[13] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4012

CURTIN MATHESON SCIENTIFIC, INC.,
PETITIONER CROSS-RESPONDENT

versus

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT CROSS-PETITIONERS

PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

[Entered Nov. 4, 1988]

JUDGMENT

Before WILLIAMS and GARWOOD, Circuit Judges, and NOWLIN,* District Judge.

On November 4, 1988, being fully advised in the premeses [*sic*], the Court handed down its decision denying enforcement of the Board's order.

ON CONSIDERATION WHEREOF, It is hereby ordered and adjudged that enforcement of the said order of the National Labor Relations Board be denied.

IT IS FURTHER ORDERED that each party shall bear its own costs on appeal.

WILLIAMS, Circuit Judge, dissenting.

* District Judge of the Western District of Texas, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4012

CURTIN MATHESON SCIENTIFIC, INC.,
PETITIONER CROSS-RESPONDENT

versus

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT CROSS-PETITIONER

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

ON SUGGESTION FOR REHEARING EN BANC
(Opinion November 4, 5 Cir., 1988, __ F.2d __)

[Filed Dec. 22, 1988]

Before WILLIAMS, GARWOOD and [*sic*] Circuit Judges and NOWLIN*, District Judge.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc

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* District Judge of the Western District of Texas, sitting by designation.

(Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J.S. WILLIAMS
United States Circuit Judge

APPENDIX E

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD

Case 20–CA–15817

BUCKLEY BROADCASTING CORPORATION OF CALIFORNIA, d/b/a STATION KKHI

and

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, LOCAL 51, AFL-CIO

[July 27, 1987]

DECISION AND ORDER

On 30 September 1981 Administrative Law Judge David G. Heilbrun issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified herein and to adopt the recommended Order.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We have further considered the Respondent's implied contention that the judge has evidenced a bias or at least an appearance of bias in this proceeding. We have carefully considered the record and attached decision and find these charges of bias unsupported and without merit.

The judge found that Respondent did not have sufficient objective considerations to support its asserted good-faith doubt of the Union's majority status and therefore that its November 1980 withdrawal of recognition violated Section 8(a)(5) and (1) of the Act. While we adopt the judge's conclusions, we do so for the following reasons.

The facts are essentially not in dispute and are set forth in greater detail by the judge. The Union and the Respondent have had a collective-bargaining relationship for a number of years. Contract negotiations pursuant to the Union's timely notice of reopening were begun before the 1 February 1978 expiration of the most recent collective-bargaining agreement. A primary stumbling block in negotiations was the Respondent's desire to institute "combo," i.e., assignment of engineering and announcing work to one on-air employee, rather than the historical practice of having separate employees perform each function. The parties' disagreement on this issue led to impasse on 22 August 1979, after which the Respondent implemented its final offer. When negotiations resumed in September 1979, the Union was willing to accept the concept of combo if its member employees were assigned to do the work. The Respondent, however, wished to assign the work to its employees represented by the American Federation of Television and Radio Artists (AFTRA). The Respondent's five employees represented by the Union struck on 12 November 1979.

When, pursuant to its final offer, the Respondent began assigning combo work to its AFTRA-represented employees, the Union instituted proceedings against AFTRA pursuant to jurisdictional dispute procedures set forth in article XX of the AFL-CIO constitution. In October 1980 the proceedings were concluded in favor of the Union.

During the period between the commencement of the strike and the conclusion of the article XX proceedings, the Union made no attempt to resume negotiations with the Respondent. In support of its bargaining position, the Union sought to induce advertisers away from the Respondent, an endeavor that in at least one case was successful. In the meantime, the Respondent hired permanent replacements for the five strikers, and two of the strikers resigned their positions with the Respondent.

Upon resolution of the jurisdictional dispute, the Union sent a letter dated 30 October 1980 to the Respondent requesting bargaining in light of the "changed circumstances." By letter dated 6 November 1980, the Respondent withdrew recognition from the Union. In so doing it denied the Union's assertion that it was the exclusive representative of the Respondent's engineering and technical employees, rejected the Union's reliance on the AFL-CIO proceeding as creating "changed circumstances" for negotiations, and cited the substantial period of time between the expiration of the collective-bargaining agreement and the Union's request for further negotiations.

In addressing the Respondent's claim of good-faith doubt of the Union's majority status, the judge rejected as a matter of law the basis for its asserted good-faith doubt put forth by the Respondent in its 6 November 1980 letter, i.e., the passage of time between the expiration of the collective-bargaining agreement in February 1978 and the Union's 30 October 1980 letter. In addition, the judge addressed the Respondent's alternative contention that its

asserted good-faith doubt is supported by its hiring of permanent replacements for the strikers and strengthened by the fact that two of the strikers resigned. The judge rejected this argument as well, relying on the presumption that strike replacements support the union in the same ratio as the strikers, and further finding that the Respondent presented no actual evidence that the strike replacements were opposed to representation by the Union.[2] Accordingly, the judge concluded that the Respondent's withdrawal of recognition violated Section 8(a)(5) and (1).

In its exceptions the Respondent argues, inter alia, that under the circumstances of this case the presumption regarding striker replacements is inapplicable, and asserts that the facts support its good-faith doubt. We consider the presumption concerning strike replacements below.

Absent unusual circumstances, there is an irrebuttable presumption that a union enjoys majority status during the first year following its certification.[3] On expiration of the certification year, the presumption of majority status continues but may be rebutted.[4] An employer who wishes to withdraw recognition after a year may do so in one of two ways: (1) by showing that on the date recognition was withdrawn the union did not in fact enjoy majority status, or (2) by presenting evidence of a sufficient objective basis for a reasonable doubt of the union's majority status at the time the employer refused to bargain.[5]

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[2] The Respondent introduced affidavits of the five strike replacements stating only that they had never been contacted during the strike by the Union.

[3] *Ray Brooks v. NLRB,* 348 U.S. 96, 98-104 (1954).

[4] *Celanese Corp. of America,* 95 NLRB 664 (1951), cited with approval in *Ray Brooks,* supra.

[5] *Retired Persons Pharmacy v. NLRB,* 519 F.2d 486 (2d Cir. 1975), enfg. 210 NLRB 443 (1974); *Allied Industrial Workers Local 289 v. NLRB,* 476 F.2d 868 (D.C. Cir. 1973), enfg. 192 NLRB 290 (1971);

The presumption of continuing majority status serves two important functions: first, it promotes continuity in bargaining relationships, i.e., gives the relationship "some measure of permanence,"[6] and, second, the presumption protects the express statutory right of employees to designate a collective-bargaining representative of their own choosing, and prevents an employer from impairing that right without objective evidence that the representative the employees have designated no longer enjoys majority support.[7] There is, in effect, a corollary to the presumption of continuing majority status which is that the Board presumes that, generally, at least a majority of *new* employees support the union.

In *Pennco, Inc.*,[8] the Board reaffirmed a more controversial and less established presumption concerning union majority, i.e., that permanent strike replacements hired during a strike support the union in the same ratio as the striking employees whom they replaced.[9] It is this pre-

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Terrell Machine Co. v. NLRB, 427 F.2d 1088 (4th Cir. 1970), enfg. 173 NLRB 1480 (1969).

[6] *NLRB v. Century Oxford Mfg. Corp.*, 140 F.2d 541, 542 (2d Cir. 1944), enfg. 47 NLRB 835 (1943). Chairman Dotson acknowledges the importance of continuity in bargaining relationships, but does not necessarily accord it absolute supremacy in all contexts. See his and former Member Dennis' joint dissent in *Gibbs & Cox,* 280 NLRB No. 110 (June 24, 1986) (withdrawal of recognition in a separately recognized unit which was assertedly "merged" into a larger overall unit).

[7] *Pennco, Inc.*, 250 NLRB 716 (1980), enfd. 684 F.2d 340 (6th Cir.), cert. denied 459 U.S. 994 (1982). See also *Fall River Dyeing & Finishing Corp.* v. *NLRB,* 55 LW 4706 (June 6, 1987).

[8] Supra, 250 NLRB 716.

[9] In approving this presumption of strike replacement support for the union, the Board in *Pennco* simultaneously rejected a contrary presumption, urged by the employer in that case, that strike replacements and nonstriking employees *oppose,* or do not support, the union. As discussed more fully below, we continue to reject such a

sumption that we scrutinize and ultimately abolish, for the reasons discussed below.

As a matter of policy, there is no warrant for a presumption of strike replacement support for an incumbent union. Indeed, prior to 1975, there was no such presumption. In *Jackson Mfg. Co.*,[10] the panel majority affirmed the trial examiner's dismissal of an allegation that the employer had unlawfully withdrawn recognition from the union during a strike, following the hiring of replacements for all the striking employees. More specifically, the panel adopted the following rationale of the trial examiner:

> General Counsel's contention that Respondent unlawfully refused to bargain with the Union on and after June 10, 1958, rests upon the assumption that the Union's majority status established by consent of the parties following a card check in August 1957, continued unaffected throughout the duration of the strike and regardless of the fact that the strikers had been permanently replaced. This contention would prevail, and General Counsel so concedes in his brief to me, only if the strikers retained their employee status throughout the entire period, being entitled to immediate reinstatement upon application at the close of the strike. As I have concluded that under the circumstances of this case the strike was an economic one and not an unfair labor practice strike as urged by General Counsel, it is evident that no replaced striker retained his employee status. Consequently, at the time of its demands for resumption of bargaining, on June 9, 1958, it is doubtful that the Union represented anything near a majority of the employees, unless it

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presumption of strike replacement opposition to or nonsupport of the union.

[10] 129 NLRB 460 (1960).

could be shown (as it was not) that the replacements hired during the strike had chosen the Union to represent it—a most improbable situation.[11]

In *S & M Mfg. Co.*,[12] the panel majority of then Members Brown and Jenkins stated that the validity of any finding of unlawful refusal to bargain on the part of an employer depends on the existence of majority support for the union on the date of the employer's refusal to bargain. There, the employer effectively refused to bargain further with the union on a certain date, without, however, questioning the union's majority status. The panel majority found that on the date of the employer's refusal to bargain, the only employees working were returning strikers who had resigned from the union or newly hired employees who had crossed the union's picket line to go to work and who were "not shown to have manifested their support of the Union." Thus, the panel majority was unable to find that there were *any* union adherents among the employees working on the date the employer effectively refused to bargain. In dissent, then Member Fanning argued that:

> [A]n established bargaining representative which, as here, goes on strike with the support of all employees should be entitled to a presumption of continuing majority status, at least until it is challenged by the Company or put to the test in a Board election.[13]

Nevertheless, the panel majority dismissed the allegation of unlawful refusal to bargain, finding that the General

[11] Id. at 477-478. We cite this case only as an indication that the presumption that strike replacements support the union is not long held, and do not pass on other findings made by the trial examiner.

[12] 172 NLRB 1008 (1968).

[13] Id. at 1009-1010.

Counsel had failed to satisfy his burden of establishing that the union enjoyed majority status on the date the employer refused to bargain with the union.

In *Peoples Gas System,*[14] the Board found that the employer lawfully withdraw [*sic*] recognition from the incumbent union on the basis of the employer's reasonable doubt of the union's continued majority status, which reasonable doubt was itself based on, inter alia, the fact that 40 percent of the employees had been permanently replaced during an economic strike which occurred 3 years prior to the employer's withdrawal of recognition.[15] In this regard, the Board stated:

> While it is of course possible that the [strike] replacements, who had chosen not to engage in the strike activity, might nevertheless have favored union representation, it was not unreasonable for [the] Respondent to infer that the degree of union support among these employees who had chosen to ignore a Union-sponsored picket line might well be somewhat weaker than the support offered by those who had vigorously engaged in concerted activity on behalf [of] Union-sponsored objectives.[16]

Thus, the Board in *Peoples Gas* continued to refrain from creating any presumptions about the pro- or antiunion sympathies of strike replacements.

[14] 215 NLRB 944 (1974).

[15] Also, there had been a 17-percent accretion to the unit after the strike, with none of the accreted employees signing union authorization cards, and there was an approximately 35-percent turnover of employees during the 8-month period prior to the employer's withdrawal of recognition.

[16] 214 NLRB at 947.

However, in *Cutten Supermarkets,*[17] the Board, without any supporting rationale or citation to apposite precedent, implied in dictum that strike replacements are presumed to support the union in the same ratio as those whom they have replaced. In that case, the employer withdrew recognition from the union, asserting that it possessed a reasonable doubt, based on objective considerations, of the union's continued majority status. More specifically, on the date that the employer withdrew its recognition of the union, its employee complement consisted of four striking employees, three strike replacements, and the nonstriking assistant manager (who the employer asserted was a bargaining unit employee, and not a supervisor within the meaning of Section 2(11) of the Act, and who was, therefore, assertedly includable in the employer's computations of employee support for the union).

In rejecting the employer's assertion of reasonable doubt about the union's continued majority status, the Board found that the nonstriking assistant manager was a supervisor, and not a rank-and-file employee whose union sentiments could properly be considered in determining whether the union continued to enjoy the support of a majority of the bargaining unit employees. Thus, the Board found that on the date that the employer withdrew its recognition of the union, there were seven employees in the unit: four striking employees and three strike replacements. As to the strike replacements, the Board correctly stated that there was no presumption that strike replacements and nonstriking employees were *opposed* to the union. The Board also found that the employer had produced no affirmative evidence to support its contention that the strike replacements and nonstriking individual

[17] 220 NLRB 507 (1975).

were opposed to the union. However, with reference to the strike replacements, the Board inexplicably stated:[18]

> Indeed, it is a well-settled principle that *new employees* are presumed to support the union in the same ratio as those whom they have replaced.[11]

[11] *True Temper Corp.*, 217 NLRB [1120] (1975); *Maywood Packing Co.*, 181 NLRB 778, 781 (1970); *Laystrom Manufacturing Co.*, [151 NLRB 1482 1482 (1965)].

Apparently, this was the first time that the Board linked the presumption on *new employee* (i.e., normal economic turnover) support for an incumbent union to strike replacements. We emphasize that the Board did so in dictum and without rational [*sic*] or precedent. First, the cases relied on by the Board in footnote 11 of the excerpted passage above involved new employees in the course of normal economic turnover, and not strike replacements.

Second, the Board summarized the evidence of support for the union is *Cutten Supermarket* as follows: "four strikers who clearly supported the Union and *three replacements whose union sentiments were not known.*" 220 NLRB at 509 (emphasis added). Thus, notwithstanding its apparent earlier linkage of the presumption of new employee support for an incumbent union to strike replacements in this case, the Board clearly did not actually *apply* any such presumption of strike replacement support for the union to the facts before it.

In any event, in *Beacon Upholstery Co.*,[19] the Board found that the employer had lawfully withdrawn recognition from the union on the basis of a reasonable doubt that the union enjoyed the majority support of the em-

[18] *Cutten Supermarket*, 220 NLRB at 509 (emphasis added).

[19] 226 NLRB 1360 (1976).

ployees. On the date of the employer's withdrawal of recognition, there were 13 employees in the bargaining unit: 10 strike replacements and 3 employees who had had not gone on strike. Thirteen striking employees had been lawfully discharged 4 days before the employer's withdrawal of recognition. The administrative law judge, affirmed without comment by the Board, found that the employer had rebutted the presumption of continued majority support for the union flowing from the recently expired collective-bargaining agreement simply by establishing that the only employees in the bargaining unit as of the date of the employer's withdrawal of recognition were 3 nonstrikers and 10 strike replacements (all 13 of the striking employees having been lawfully discharged prior to the withdrawal of recognition). The judge stated: "Under these circumstances I do not believe that it can be presumed that the strike replacements supported the Union in the same ratio as the discharged strikers."[20]

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[20] Id. at 1367-1368. The chairman notes that the judge did note that the Board in *Cutten Supermarket,* supra, had applied *to strike replacements* the presumption that new employees support the union in the same ratio as those they replaced. In not applying that presumption to the strike replacements in *Beacon Upholstery,* the judge found that the striking employees in *Beacon Upholstery,* unlike those in *Cutten Supermarket,* had been discharged, and that therefore "the Union's loyalty lay with [the discharged strikers, whose interests] were diametrically opposed to those of the strike replacements." He finds this proposition to be no less applicable in the case of *undischarged* strikers, such as those in *Cutten Supermarkets,* and he finds the two cases in question not materially distinguishable in that regard. In any event, however, he finds that the judge in *Beacon Upholstery* was correct in not applying *to strike replacements* the presumption that new employees in a *normal turnover* situation support the union in the same ratio as those they replaced. In this regard, he rejects rather than tries to distinguish, the application of this presumption to the strike replacements in *Cutten Supermarket.* As indicated above, he finds

About 15 months after *Cutten Supermarket*, and only 2 weeks after *Beacon Upholstery*, the Board again addressed the issue presumptive support for or opposition to a union on the part of strike replacements in *Arkay Packaging Corp.*[21] There, a panel majority found that the employer lawfully withdrew recognition from three unions on the basis of its reasonable doubt about the continued majority status of those unions. The majority expressly affirmed the adminstrative law judge's finding that the unions' *presumptive* majority status flowing from their collective-bargaining agreements had been rebutted by the fact that the unions failed to respond at all to the employer's written notifications to the unions and to the striking employees that the latter would be permanently replaced if they did not return to work by a specified date; the striking employees were, in fact, permanently replaced; and the unions made no attempt to contact the employer or monitor the application of the still-current collective-bargaining agreements during the strike. Thus, the judge found, and the Board panel majority expressly agreed, that:

> It is reasonable to conclude that none of the three Unions in fact had been designated by any of the replacements, nor is there evidence to the contrary. This and their apparent lack of interest for several months reasonably cast serious doubt on each union's continued majority status.[22]

The majority found that, under the circumstances, the employer had sufficient objective bases to support a

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that the Board's application of this presumption to the strike replacements in that case was both unnecessary – dictum – and unsupported by rationale or precedent.

[21] 227 NLRB 397 (1976).

[22] Id. at 397.

reasonable doubt that the *striking employees* themselves continued to support the unions. Turning its attention to the strike replacements, and without referring to *Cutten Supermarket* or *Beacon Upholstery*, the majority stated:

> [W]e would not . . . charge Respondent, in fact or in law, with a belief that [the strike replacements] desired representation by the Unions. [The presumption that new employees support a union in the same ratio as those whom they have replaced] has been held to obtain in the normal turnover situation. . . . But, in the strike situation present in this case, it would be wholly unwarranted and unrealistic to presume as a matter of law that, when hired, the replacements . . . favored representation by the Union to the same extent as the strikers [citing *Peoples Gas*, supra, and setting forth the same excerpt from that case that is set forth herein at fn. 16, supra]. The facts certainly would not support such a presumption. And since the replacements' hiring, no more has been heard from them to demonstrate any degree of union support than has been heard from the strikers. There is, therefore, at least as much justification for not indulging in a presumption that the replacements favor the Unions and for finding that Respondent had reasonable grounds for not believing that to be so, as there is for finding, as we have, that it was reasonable for Respondent to question the continued union adherence of the striking employees.[23]

[23] Id. at 397-398. In declining to apply to *strike replacements* the presumption that a majority of new employees in a normal turnover situation support the union, the majority expressly rejected the fully articulated argument in favor of such a presumption raised by then Member Jenkins in his dissenting opinion.

However, in *Windham Community Memorial Hospital,*[24] the Board set out to clarify the law on the issue of whether strike replacements may be presumed to support the union. The Board stated, "The general rule . . . is that new employees, including striker replacements, are presumed to support the union in the same ratio as those whom they have replaced."[25] The Board explained that it had declined to follow that "well-settled principle" in *Arkay Packaging,* and had held instead that the employer in *Arkay Packaging* could presume that the strike replacements did *not* support the union, because of the "unique circumstance that the union had apparently abandoned the bargaining unit." The Board in *Windham* thus held that *Arkay Packaging* represented a limited exception to the presumption that new employees, including strike replacements, support the union.

Finally, in *Pennco*, supra, the Board *rejected* the employer's contention that the presumption of new employee support for the union does not apply to strike replacements. In doing so, however, the Board stated simply:

> The Board has long held that [the presumption of strike replacement support for the union] applies as a matter of law, and it is incumbent upon Respondent

[24] 230 NLRB 1070 (1977), enfd. 577 F.2d 805 (2d Cir. 1978).

[25] Id., 230 NLRB 1070, citing *Cutten Supermarket,* supra, and *Surface Industries*, 224 NLRB 155, 163 (1976), where the judge, in an opinion adopted by the Board, relied on *Cutten Supermarket*, in applying the new employee presumption to strike replacements. However, as seen from the discussion of *Cutten Supermarket* supra, the application of the presumption of new employee support for the union to the strike replacements in that case was in dictum, and was not supported by any analysis or by apposite precedent.

> to rebut it even, and perhaps especially, in the event of a strike.[26]

The Board in *Pennco* cited no cases in support of its assertion that the presumption in question was "long held." Indeed, as the preceding discussion of cases clearly demonstrates, this presumption was not "long held" at all, but in fact was not articulated in any fashion until *Cutten Supermarket* in 1975, only 5 years prior to *Pennco*, and even then (i.e., in *Cutten*) in dictum and without supporting rationale or precedent. Nor has the Board in cases subsequent to *Cutten* involving this presumption (including, as seen, *Pennco* itself) provided any such supporting rationale. We perceive none. On the contrary, as discussed below, we perceive substantial reasons to eliminate this presumption.

Although the Board has continued to apply the presumption of strike replacement union support,[27] the circuit courts have uniformly rejected it, even when they have enforced Board orders. Thus, the Sixth Circuit in *Pennco* enforced the Board's Order but specifically declined to adopt either the Board's or the employer's suggested presumption. Rather, the court found that that given the facts of the case, the evidence was sufficient "only to put the parties in equipoise."[28] The court continued, however, finding that "equipoise is not enough for Pennco to demonstrate by objective evidence good faith doubt as to the Union's majority status. Pennco would need some further evidence of union non-support. . . ."[29] Similarly,

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[26] 250 NLRB at 717.

[27] E.g., *I T Services*, 263 NLRB 1183 (1982) (presumption applied but sufficient evidence presented to rebut it).

[28] 684 F.2d at 343.

[29] Id.

in *Windham Community Memorial Hospital v. NLRB*,[30] the Second Circuit declined to endorse the Board's presumption, and enforced the Board's Order by concluding that the employer was not, in turn, entitled to a presumption that the strike replacements did not support the union.

In cases where the courts have denied enforcement, two courts have appeared to base their decisions on the premise that strike replacements may be presumed not to support the union, thus concluding that the Board's presumption was unwarranted.[31] Most recently, the Ninth Circuit noted that the presumption has never been embraced by any court, and affirmed an administrative law judge's conclusion that under the facts of that case, it was unrealistic to presume that the strike replacements supported the union.[32]

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[30] 577 F.2d 805 (2d Cir. 1978).

[31] *National Car Rental System v. NLRB*, 594 F.2d 1203 (8th Cir. 1979); *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981). See also *NLRB v. Randle-Eastern Ambulance Service*, 584 F.2d 720 (5th Cir. 1978).

The Chairman further notes that the Eighth Circuit's rejection of the presumption of strike replacement support for the union in *National Car Rental System v. NLRB*, supra, was couched in particularly strong terms:

> If this presumption were to be employed here, we would reach the ridiculous result of presuming that all of the ten new employees favored representation by the union even though they had crossed the union's picket lines to apply for work and to report to work each day after they were hired. This presumption of the Board is not specifically authorized by statute and is so far from reality in this particular case that it does not deserve further comment.

594 F.2d at 1206. The Chairman adds that indeed, and perhaps not coincidentally, the employer in *National Car Rental System* argued before the administrative law judge that "in order to presume that strike replacements supported the Union we must also presume that they are idiots." 237 NLRB 172, 174 (1978).

[32] *Whisper Soft Mills v. NLRB*, 754 F.2d 1381 (9th Cir. 1984).

Just as there is no articulated basis in reason or policy for a presumption that strike replacements support the union in the same ratio as the striking employees they replace, so too is there no evidentiary or empirical basis for such a presumption.

Presumptions are "fixed rule[s] of law," creating for the party against whom the presumption operates the burden of producing other evidence to rebut the presumptive fact.[33] More specifically, a rebuttable presumption of fact simply shifts to the party against whom the presumption operates the burden of producing evidence to rebut the presumption by establishing the contrary of the presumed fact.

As an evidentiary matter, presumptions should arise when it is believed that proof of one fact renders the inference of the existence of another fact so probable that it is sensible and timesaving to assume the truth of the inferred fact until it is affirmatively disproved.[34] In this light we have, as seen, carefully reviewed the Board's past decisions and assessed our experience to determine if they suggest generalizations about the views of permanent strike replacements that are so universal that they support one overall presumption that can be applied when evaluating a union's majority status. Thus incumbent unions and strikers have sometimes shown hostility toward the permanent replacements,[35] and in some instances, the union has lacked interest, at least for the duration of the strike, in

[33] 9 Wigmore, *Evidence*, § 2487 at 295-296 (Chadbourn rev. 1981); see also McCormick, *Evidence*, § 342 at 803 (2d ed. 1972).

[34] McCormick, *Evidence*, § 343 at 807 (2d ed. 1972).

[35] See, e.g., *I T Services*, 263 NLRB 1183 (1982); *Beacon Upholstery Co.*, 226 NLRB 1360); *Titan Metal Mfg. Co.*, 135 NLRB 196 (1962).

negotiating on the replacements' behalf.[36] At the same time, permanent replacements are typically aware of the union's primary concern for the striker's welfare, rather than that of the replacements. In this regard, the replacements' attitude towards union representation may be influenced by this awareness, which in turn undermines the basis for an evidentiary presumption of support for the union.[37] In light of these factors, we can find no basis for presuming that strike replacements who have accepted employment and are therefore willing to cross a picket line in order to go to work favor union representation. Accordingly, to the extent that *Pennco* relied on such a presumption, that case is overruled.

On the other hand, we find the contrary presumption equally unsupportable. Thus, the hiring of permanent replacements who cross a picket line, in itself, does not support an inference that the replacements repudiate the union as collective-bargaining representative.[38] As the court in *Pennco* noted, "the Board correctly points out that the failure to join an economic strike may not indicate a lack of support for the union, but rather may demonstrate employees' economic concerns."[39] In this regard, an employee may be forced to work for financial reasons, or may disapprove of the strike in question but still desire union representation and would support other union initiatives. The presumption of union disfavor is therefore not factually compelling. Moreover, adoption of this presumption would disrupt the balance of competing

[36] See *I T Services*, supra; *Arkay Packaging Corp.*, 227 NLRB 397 (1976).

[37] See *I T Services*, supra; *Beacon Upholstery*, supra.

[38] *NLRB v. Frick Co.*, 423 F.2d 1327 (3d Cir. 1970); *Rogers Mfg. Co. v. NLRB*, 486 F.2d 644 (6th Cir. 1973).

[39] *NLRB* v. *Pennco*, supra, 684 F.2d at 342.

economic weapons long established in strike situations and substantially impair the employees' right to strike by adding to the risk of replacement the risk of loss of the bargaining representative as soon as replacements equal in number to the strikers are willing to cross the picket line.[40]

Based on the foregoing, we can discern no overriding generalization about the views held by strike replacements and therefore we decline to maintain or create any presumptions regarding their union sentiments. Rather, we will review the facts of each case, but will require "some further evidence of union non-support"[41] before concluding that an employer's claim of good-faith doubt of the union's majority is sufficient to rebut the overall presumption of continuing majority status.

Turning now to the present case, we agree with the judge that the Respondent has not established sufficient objective considerations to support its withdrawal of recognition from the Union. The only factor presented by the Respondent is its hiring of five permanent replacements at a time when there were only three remaining strikers. This fact by itself, is insufficient to establish a good-faith doubt. Nor can we ascertain the replacements' union sentiments either from their having crossed a peaceful and sporadic picket line or from the Union's failure to contact the replacements during the strike. Rather, more evidence would be required to support a good-faith doubt, as these events, common to the hiring of

[40] *Pennco, Inc.*, 250 NLRB 717. Chairman Dotson agrees that a presumption that strike replacements oppose the union is not factually compelling, has no empirical foundations, and is thus insupportable for that reason alone. Accordingly, he finds it unnecessary to rely on the policy reason set forth in *Pennco* and invoked here by his colleagues for not adopting such a presumption.

[41] *NLRB v. Pennco*, supra 684 F.2d at 343.

replacements, do not adequately demonstrate the replacements' union sentiments. The Respondent, however, has failed to present other evidence indicating the union sentiments of the replacements.[42] Thus we cannot conclude, even absent the presumption on which the judge relied, that the Respondent has established sufficient objective considerations to support its claim of good-faith doubt.[43] Accordingly, in agreement with the judge, we find that the Respondent's withdrawal of recognition from the Union violated Section 8(a)(5) and (1) of the Act.

[42] As noted earlier, the affidavits of the five strike replacements introduced by the Respondent state only that they were not contacted by the Union since the strike began. There is no evidence concerning the replacements' union sentiments.

[43] We agree with the judge that here, unlike *Arkay Packaging Corp.*, 227 NLRB 397 (1976), there is no evidence that the Union abandoned the bargaining unit. In this regard, as found by the judge, the Union continued to "shadow" the bargaining relationship by pursuing the AFL-CIO internal jurisdictional dispute resolution procedures, organizing picketing, and attempting, in at least one instance successfully, to induce advertisers to withdraw business from the Respondent.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Buckley Broadcasting Corporation of California, d/b/a Station KKHI, San Francisco, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. 27 July 1987

Donald L. Dotson, Chairman

Wilford W. Johansen, Member

Marshall B. Babson, Member

James M. Stephens, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

Case 20-CA-15817

BUCKLEY BROADCASTING CORPORATION OF CALIFORNIA,
d/b/a STATION KKHI

and

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES
& TECHNICIANS, LOCAL 51, AFL-CIO

Lewis S. Harris, for the General Counsel.
Ralph M. Phillips, Los Angeles, CA, for the Charging Party.
Victor P. Reed, San Francisco, CA, for Respondent.

[Sept. 30, 1981]

DECISION

Statement of the Case

DAVID G. HEILBRUN, Administrative Law Judge: This case was heard at San Francisco, California, on August 6,

1981 based on a complaint alleging that Buckley Broadcasting Corporation of California, d/b/a Station KKHI, called Respondent, violated Section 8(a)(1) and (5) of the Act by withdrawing recognition of National Association of Broadcast Employees & Technicians, Local 51, AFL-CIO, called NABET, and thereafter failing and refusing to bargain with it as the assertedly exclusive representative of engineering and technical employees.

Upon the entire record, consideration of post-hearing briefs filed by the Charging Party and Respondent,[1] and my observation of witnesses, I make the following:

Findings of Fact and Resultant Conclusion of Law

NABET has been the exclusive bargaining representative of Respondent's engineers and technicians for many years.[2] A succession of collective bargaining agreements

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[1] General Counsel made oral argument at the close of hearing, and reiterated its general contention with a letter dated August 28, 1981 embodying one case citation and a motion to correct transcript. In the absence of response or opposition thereto, I correct the transcript at page 109, line 22, by changing "It is actual matter . . ." to "It is axiomatic. . . ." Pages 110 and 111 of the transcript subordinate to actual case citations found later in this Decision. I also note an uncorrectable ambiguity at page 110, line 12, where the reported date October 30, 1979, was actually meant to refer to a letter dated October 30, 1980 (G.C. Exh. 14).

Pursuant to Section 102.42 of the Board's Rules and Regulations, I draw on many portions of the Charging Party's post-hearing brief in composing this Decision, deeming it a pertinent, lucid, well-organized expression of "proposed findings and conclusions," as equivalent to findings of fact and conclusions of law. See *Shield-Pacific Ltd.*, 245 NLRB 409 (1979).

[2] Respondent maintains its office and place of business at the 14th floor of the St. Francis Hotel in San Francisco, California, where it is engaged in operating a radio station, as to which it subscribes to various interstate news services, advertises nationally sold products,

reflected such recognition, the last of these being effective to February 1, 1978.

Based on NABET's timely notice of reopening the parties undertook negotiations for a new agreement. These continued for many months after the February 1978 expiration date, and the NABET-represented employees continued working. On August 6, 1979 Victor Reed, Respondent's attorney, sent NABET its "best and final" offer. This led to impasse on August 22, 1979, and Respondent notified NABET that it would implement its last offer with particular respect to wage scales and a lump sum retroactive payment to each fulltime engineer.

Throughout this long course of dealings the foremost impediment to agreement was "combo" (*i.e.*, the assignment of engineering and announcing work during an on-air shift to one employee.) Historically, at least two employees had been required for an on-air shift; an announcer performing live on-air speaking duties and an engineer or technician responsible for remainder of the program (*e.g.*, play-back of music and other pre-recorded sources). The impasse was essentially rooted in "combo", but by September 1979 NABET was willing to accept the concept if NABET-represented employees were assigned to do the work. This associated to a fact that the San Francisco affiliate of the American Federation of Television and Radio Artists (AFTRA) had represented Respondent's announcers and could also represent engineers and technicians in regard to "combo" assignment. Respondent was not willing to assign "combo" work to NABET-repre-

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and annually purchases goods and materials valued in excess of $5,000 which are received at its facility directly from points outside California. On these admitted facts I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and otherwise that NABET is a labor organization within the meaning of Section 2(5).

sented employees, instead wanting the work done exclusively by AFTRA-represented employees.[3]

Negotiations had resumed on September 19, 1979, but were soon clouded in controversy over whether or not an agent of Respondent had reached full agreement within the meaning of Section 8(d).[4] The parties exchanged letters in November 1979 with NABET contending that "morally and legally" an agreement was in effect, while Respondent termed this belief "ambiguous" and advised that it would effectuate some modification to what was previously unilaterally put into effect. The upshot was a strike by NABET commencing on November 12, 1979.

Soon after the Article XX proceedings concluded, Jeanne M. Bargmann, an international representative of NABET, wrote to James P. Hickey, Jr., Respondent's vice-president and general manager, as follows:[5]

> As exclusive bargaining agent of all engineering and technical employees of Radio Station KKHI, the National Association of Broadcast Employees and Technicians, AFL-CIO hereby requests that we meet to bargain with respect to the wages, hours, terms and conditions of employment of these employees.

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[3] Upon Respondent's implementation of the final offer, it began assigning AFTRA-represented employees to "combo" work. This led to proceedings by NABET against AFTRA pursuant to internal (jurisdictional) disputes resolution procedures set out in Article XX of the AFL-CIO constitution. In October 1980 the Article XX proceedings were ultimately concluded in favor of NABET.

[4] NABET filed an unfair labor practice charge on this theory in January 1980. It was dismissed and such action sustained by administrative proceedings culminating in June of 1980.

[5] On November 5, 1980 she sent a copy of the letter to Reed, apologizing for the oversight of not having done so when it was mailed out in ordinary course.

> As you are aware, the playing of records, carts and tapes by AFTRA-represented employees has been found to be a violation of Article XX, Section 3 of the AFL-CIO Constitution. In his letter to you of October 20, 1980, AFTRA Executive Secretary and Counsel Donald S. Tayer requested that you cease making such assignments to AFTRA employees. In light of these changed circumstances, please notify this office of dates as to when negotiations may commence.

Reed answered Bargmann by letter dated November 6, 1980. In part it read:

> . . . you cite to the AFL-CIO Article XX proceeding, and allege that the outcome thereof together with a letter to Mr. Hickey from Donald S. Tayer, Esquire, Executive Secretary and Counsel, AFTRA, San Francisco Local act to create a "changed circumstance" at the Station obligating the Station to enter into negotiations with NABET.
>
> We do not agree.
>
> On behalf of the Station we have advised AFTRA that we are not bound by any internal AFL-CIO proceeding because, *inter alia,* of absence of notice and opportunity to be heard, and most fundamental of all, lack of membership in the AFL-CIO which would give the Station standing. . . .
>
> As you are aware, the Collective Bargaining Agreement between KKHI and NABET, Local 51, expired by its terms on February 1, 1978, and has not been renewed despite extensive negotiations, including Mediation, which continued through September 21, 1979.
>
> Accordingly, in the premises, please be advised that by this letter, written on behalf of Buckley Broadcast-

ing Corporation, licensee of Station KKHI, the Employer hereby declares its Withdrawal of Recognition of NABET as the certified bargaining representative for engineering and technical employees of KKHI.

Lest our failure to do so be construed as an admission, please consider this letter also as categorical denial of your statement "[A]s exclusive bargaining agent for all engineering and technical employees of Radio Station KKHI. . . ."

By reason of the facts stated above, the Station considers it has no obligation to meet with NABET and declines to do so.

The general principle applicable to this case is that of rebuttable presumption attaching to a union's status as majority representative of employees in a bargaining unit where recognition has exceeded one year. The presumption may be rebutted by an employer's showing with clear, cogent and convincing evidence that it harbors a good faith reasonable doubt of such a union's continued majority support. This type of doubt will in turn justify a refusal to continue recognition where it had existed before. *Terrell Machine Company,* 173 NLRB 1480, enfd. 427 1088 (4th Cir. 1970), Cert. Den. 398 U.S. 920; *N.L.R.B.* v. *Tahoe Nugget, Inc.,* 584 F.2d 293 (9th Cir. 1978), 99 LRRM 2509.

Here the basis of Respondent's doubt is fully expressed in Reed's letter of November 6, 1980. That document touches on chronology of the long period between contract expiration and the then-current date, asserting that the employer was disinclined to have its position affected by the Article XX proceedings. This is essentially all that can be found as to why doubt over continuing majority representation of employees in the engineering and technical bargaining unit was being raised. As a matter of law it is insufficient, and for this reason alone Respondent has been shown to have unlawfully withdrawn recognition and since refused to bargain with NABET. Such a conclusion is taught by *Holiday Inn of Dayton,* 212 NLRB 553 (1974), in which the Board adopted a decision holding that when asserted doubt was based on an irrelevant consideration it could not be relied upon as valid grounds.

Notwithstanding this, the parties have litigated and argued an alternative principle dealing with the presumption of strike replacements supporting a union in the same proportion as those persons who struck. In November 1979 the unit was composed of five NABET-represented employees, all of whom joined in the strike. Picketing duty was continued in structured fashion over the November 1979—November 1980 period, with participation ranging from five at first down to two after one year had passed. Additionally, former bargaining unit members Frank Jewell and Stephen Woolard resigned their employment in February 1980 and April 1980, respectively. Over the same span NABET sought to induce advertisers away from Respondent, and this was both successful and unsuccessful in the cases of the Private Industry Council and Victoria Station (a restaurant chain) as reflected in correspondence of October 7, 1980 and October 23, 1980, respectively. In more direct relation to the presumption, Respondent introduced affidavits of the five replacement employees in which they denied having any contact from NABET during material times.[6]

In this context General Counsel argues that *Burlington Homes, Inc.,* 246 NLRB No. 165 (1979) has recently con-

[6] Two of the persons left their "radio engineer-technician" positions into which they were hired as "Permanent Replacement for striking personnel" *after* recognition was withdrawn in November 1980.

trollingly reiterated the principle of this presumption (also citing other cases), while the Charging Party adopts such authority arguing too that *Surface Industries, Inc.*, 224 NLRB 155 (1976) establishes the mere act of replacement employees crossing picket lines is not a "clear and unequivocal" sort of evidence that an employer may rely upon in claiming rebuttal of the presumption. Respondent relies most heavily on *Arkay Packaging Corporation*, 227 NLRB 397 (1976). It points to intriguing language in *Arkay*,[7] contending too that long passage of time as shown here is an objective consideration and that case authority of the opposition is distinguishable.

The Board has expressly confined *Arkay* to its own "unique circumstance" of apparent unit abandonment,[8] and clearly adheres to the presumption of proportional support by strike replacements. *Windham Community Memorial Hospital*, 230 NLRB 1070 (1977); *National Car Rental System, Inc.*, 237 NLRB 172 (1978). The denial of enforcement in *National Car Rental*,[9] including the court's criticism of *Windham*, is noteworthy but I am bound by the Board's view of this doctrine. There is no uniqueness here which would warrant application of *Arkay*, for

[7] But, in the strike situation present in this case, it would be wholly unwarranted and unrealistic to presume as a matter of law that, when hired, the replacements for the union employees who had gone on strike favored representation by the Unions to the same extent as the strikers. . . . There is, therefore, at least as much justification for not indulging in a presumption that the replacements favor the Unions and for finding that Respondent had reasonable grounds for not believing that to be so, as there is for finding, as we have, that it was reasonable for Respondent to question the continued union adherence of the striking employees. 227 NLRB at 397-8.

[8] The last sentence of what is quoted above from *Arkay* uses syntax that obfuscates its exact rationale.

[9] Reported at 594 F.2d 1203 (8th Cir. 1979).

NABET has continuously shadowed this bargaining relationship in an effort to obtain institutionally what Respondent would not concede in bargaining. This in no way weakens the thrust of *Windham* or *National Car Rental*, and I conclude that nothing Respondent has advanced in its case amounts to a rebuttal of the continuing presumption. This is particularly true where, as the Charging Party observes, nothing in even the current stated view of the three surviving replacements shows their discontent with NABET.

Accordingly, I render a conclusion of law that Respondent, by withdrawing recognition from NABET and thereafter failing and refusing to bargain with it, has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

Disposition

Upon the foregoing findings of fact, conclusion of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[10]

ORDER

Respondent, Buckley Broadcasting Corporation of California, d/b/a Station KKHI, its officer, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Continuing to withhold collective bargaining recognition from the National Association of Broadcast

[10] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Employees & Technicians, Local 51, AFL-CIO (NABET) as such was withdrawn from it in November 1980.

(b) Refusing to bargain in good faith with NABET as exclusive representative of employees in the following bargaining unit:

> All engineering and technical personnel employed by Radio Station KKHI, including chief engineer, but excluding all supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following action to effectuate policies of the Act:

(a) Upon request, bargain collectively with NABET as exclusive representative of employees in the appropriate bargaining unit described above and embody any understanding reached in a signed agreement.

(b) Post the attached notice marked "Appendix" at its San Francisco, California, place of business.[11] Copies of this notice, on forms to be provided by the Regional Director for Region 20, after being duly signed by Respondent's authorized representative, shall be conspicuously posted immediately upon receipt and be maintained for 60 consecutive days thereafter in all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that such notices are not altered, defaced, or covered by any other material.

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[11] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated: 9/30/81

/s/ David G. Heilbrun
DAVID G. HEILBRUN
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF
THE UNITED STATES GOVERNMENT

WE WILL NOT continue to withhold recognition from National Association of Broadcast Employees & Technicians, Local 51, AFL-CIO (NABET) as had been withdrawn from it by us in November 1980.

WE WILL NOT refuse to bargain in good faith with NABET as exclusive representative of employees in the following unit.

All engineering and technical personnel employed by our Radio Station KKHI, including chief engineer, but excluding all supervisors as defined in the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed by the Act.

WE WILL, upon request, bargain with NABET as exclusive representative of engineering and technical employees in the appropriate unit described above, and embody any understanding reached in a signed agreement.

BUCKLEY BROADCASTING CORPORATION OF
CALIFORNIA, d/b/a STATION KKHI
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Building, Box 36047, 450 Golden Gate Ave., San Francisco, CA 94102 Telephone Number: (415) 556-0335.

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